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OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980

HEARINGS

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

S. 2153

TO AMEND THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 TO CONCENTRATE ENFORCEMENT ACTIVITIES ON HAZARDOUS WORKPLACES AND ENCOURAGE SELF-INITIATIVE IN IMPROVING OCCUPATIONAL SAFETY AND HEALTH, AND FOR OTHER PURPOSES
AND RELATED BILLS

APRIL 15, 17, AND 25, 1980

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CONTENTS

Text of:

Page
S. 2153 ... 3
S. 1486 ... 17
S. 1572 ... 19

CHRONOLOGICAL LIST OF WITNESSES

Tuesday, April 15, 1980

Bingham, Dr. Eula, Assistant Secretary of Labor for Occupational Safety and Health, accompanied by Basil Whiting, Deputy Assistant Secretary for OSHA; Nik Edes, Deputy Under Secretary, Legislation; and Benjamin W. Mintz, Associate Solicitor for Occupational Safety and Health, Department of Labor ... 25
Thompson, Robert T., chairman, Labor Relations Committee, U.S. Chamber of Commerce, accompanied by Ted M. Wire, manager, occupational safety and health, Deere and Co., Moline, Ill., and Mark A. De Bernardo, labor relations attorney, U.S. Chamber of Commerce ... 88
McClennan, William H., president, International Association of Firefighters, AFL-CIO, CLC, Washington, D.C.; George Robinson, director, Occupational Safety and Health, International Association of Machinists and Aerospace Workers, AFL-CIO, Washington, D.C.; and Stanley Eller; safety and health director, International Chemical Workers Union, Washington, D.C ... 122
Chatak, Elmer, secretary-treasurer, Industrial Union Department, AFL-CIO, accompanied by Sheldon W. Samuels, director, health, safety and environment, Industrial Union Department, AFL-CIO ... 214
Davis, Ron, national vice president, public affairs, American Society for Personnel Administration, Greensboro, N.C., accompanied by Priscilla Camperud, director of personnel, St. Joseph's Hospital, Stockton, Calif.; Donald Matthews, chairman, Energy Committee, American Subcontractors Association, Washington, D.C.; and Robert G. Griffith, vice president, National Utility Contractors Association, Chantilly, Va., accompanied by Don DeHart, safety consultant, National Utility Contractors Association, Indianapolis, Ind ... 233

Tuesday, April 17, 1980

Thurmond, Hon. Strom, a U.S. Senator from the State of South Carolina ... 269
Marciante, Charles, H., president, New Jersey State AFL-CIO; Joseph W. Powell, president, West Virginia Labor Federation, AFL-CIO; and Julian F. Carper, president, Virginia State AFL-CIO, a panel ... 282
Gallagher, Richard, president, Gallagher Corp., appearing on behalf of the National Association of Manufacturers, accompanied by W. Scott Railton, NAM labor law advisory panel, Francis M. Lunnie, Jr., director, occupational safety and health, NAM; and William E. Blasier, associate general counsel, NAM ... 311
Glasser, Melvin A., director, United Automobile Workers Social Security Department, accompanied by Dr. Franklin Mirer, assistant director ... 336
Vial, Donald, director, State of California Department of Industrial Relations, San Francisco, Calif.; and C. Patrick Babcock, director, Michigan Department of Labor, Lansing, Mich ... 366
Mann, Robert E., Esq., of Seyfarth, Shaw, Fairweather, and Geraldson, accompanied by Mark A. Lies, Esq., and F. Keith Adkinson, Esq ... 453

Friday, April 25, 1980

Church, Hon. Frank, a U.S. Senator from the State of Idaho ... 487
Denison, Ray, legislative director, American Federation of Labor/Congress of Industrial Organizations, Washington, D.C., accompanied by George Taylor, head of health and safety department; and Larry Gold, counsel for AFL-CIO ... 501

Page
McKevitt, James D. "Mike", director of federal legislation, National Federation of Independent Business, accompanied by Sally Douglas and Michael Roush, Washington office, National Federation of Independent Business 606
Sheehan, John J., legislative director, United Steelworkers of America, accompanied by Mike Wright, industrial hygienist, and Steve Newman 629
Sheinkman, Jacob, secretary-treasurer, Amalgamated Clothing and Textile Workers Union, AFL-CIO, accompanied by Eric Frumin, acting director, Department of Occupational Safety and Health, and Elizabeth Smith, legislative representative 691
Hancock, Nolan W., legislative director, Oil, Chemical and Atomic Workers International Union, accompanied by Dr. Frank Collins, Washington office consultant; Steve Wodka, international representative; and Billy Canipe, member, Local 3-770, Memphis, Tenn 726
Maisonpierre, Andre, vice president, Alliance of American Insurers 747

STATEMENTS

American Subcontractors Association, Donald Matthews, ASA safety committee chairman, prepared statement 240
Bingham, Dr. Eula, Assistant Secretary of Labor for Occupational Safety and Health, accompanied by Basil Whiting, Deputy Assistant Secretary for OSHA; Nik Edes, Deputy Under Secretary, Legislation; and Benjamin W. Mintz, Associate Solicitor for Occupational Safety and Health, Department of Labor 25
Bumpers, Hon. Dale, a U.S. Senator from the State of Arkansas, prepared statement 490
Carper, Julian F., president, Virginia State AFL-CIO, prepared statement 303
Chatak, Elmer, secretary-treasurer, Industrial Union Department, AFL-CIO, accompanied by Sheldon W. Samuels, director, health, safety and environment, Industrial Union Department, AFL-CIO 214
  Prepared statement 218
Church, Hon. Frank, a U.S. Senator from the State of Idaho 487
Cranston, Hon. Alan, a U.S. Senator from the State of California, prepared statement 24
Davis, Ron, national vice president, public affairs, American Society for Personnel Administration, Greensboro, N.C., accompanied by Priscilla Camperud, director of personnel, St. Joseph's Hospital, Stockton, Calif.; Donald Matthews, chairman, Energy Committee, American Subcontractors Association, Washington, D.C.; and Robert G. Griffith, vice president, National Utility Contractors Association, Chantilly, Va., accompanied by Don DeHart, safety consultant, National Utility Contractors Association, Indianapolis, Ind 233
Denison, Ray, legislative director, American Federation of Labor/Congress of Industrial Organizations, Washington, D.C., accompanied by George Taylor, head of health and safety department; and Larry Gold, counsel for AFL-CIO 501
  Prepared statement (with attachments) 507
District 65 U.A.W., Frank Brown, organization director, prepared statement..... 481
Gallagher, Richard, president, Gallagher Corp., appearing on behalf of the National Association of Manufacturers, accompanied by W. Scott Railton, NAM labor law advisory panel; Francis M. Lunnie, Jr., director, occupational safety and health, NAM; and William E. Blasier, associate general counsel, NAM 311
Glasser, Melvin A., director, United Automobile Workers Social Security Department, accompanied by Dr. Franklin Mirer, assistant director 336
  Prepared statement 341
Hancock, Nolan W., legislative director, Oil, Chemical and Atomic Workers International Union, accompanied by Dr. Frank Collins, Washington office consultant; Steve Wodka, international representative; and Billy Canipe, member, Local 3-770, Memphis, Tenn 726
  Prepared statement 728
Helms, Hon. Jesse, a U.S. Senator from the State of North Carolina, prepared statement 497
International Chemical Workers Union, prepared statement (with attachments) 137

Page
Maisonpierre, Andre, vice president, Alliance of American Insurers 747
Prepared statement 751
Mann, Robert E., Esq., of Seyfarth, Shaw, Fairweather, and Geraldson, accompanied by Mark A. Lies, Esq., and F. Keith Adkinson, Esq 453
Prepared statement 463
Marciante, Charles, H., president, New Jersey State AFL–CIO; Joseph W. Powell, president, West Virginia Labor Federation, AFL–CIO; and Julian F. Carper, president, Virginia State AFL–CIO, a panel 282
McClennan, William H., president, International Association of Firefighters, AFL–CIO, CLC, Washington, D.C.; George Robinson, director, Occupational Safety and Health, International Association of Machinists and Aerospace Workers, AFL–CIO, Washington, D.C.; and Stanley Eller; safety and health director, International Chemical Workers Union, Washington, D.C 122
Prepared statement 127
McKevitt, James D. "Mike", director of federal legislation, National Federation of Independent Business, accompanied by Sally Douglas and Michael Roush, Washington office, National Federation of Independent Business 606
Prepared statement 609
Michigan Department of Labor, C. Patrick Babcock, director, prepared statement 436
National Association of Manufacturers, prepared statement 315
Powell, Joseph W., president, West Virginia Labor Federation, AFL–CIO, prepared statement 288
Robinson, George J., director, occupational safety and health and community services, International Association of Machinists and Aerospace Workers, prepared statement 172
Sheehan, John J., legislative director, United Steelworkers of America, accompanied by Mike Wright, industrial hygienist, and Steve Newman 629
Prepared statement 634
Summary statement 671
Sheinkman, Jacob, secretary-treasurer, Amalgamated Clothing and Textile Workers Union, AFL–CIO, accompanied by Eric Frumin, acting director, Department of Occupational Safety and Health, and Elizabeth Smith, legislative representative 691
Prepared statement (with attachments) 694
Thompson, Robert T., chairman, Labor Relations Committee, U.S. Chamber of Commerce, accompanied by Ted M. Wire, manager, occupational safety and health, Deere and Co., Moline, Ill., and Mark A. De Bernardo, labor relations attorney, U.S. Chamber of Commerce 88
Prepared statement 98
Thurmond, Hon. Strom, a U.S. Senator from the State of South Carolina 269
Vial, Donald, director, State of California Department of Industrial Relations, San Francisco, Calif.; and C. Patrick Babcock, director, Michigan Department of Labor, Lansing, Mich 366
Prepared statement 372

ADDITIONAL INFORMATION

Articles, publications, etc.:

Citation of serious violation filed against Humko-Sheffield Chemical Co., Nashville, Tenn 744
Characteristics of Utility Construction Firms and Their Relationship to Job Safety, by Jimmie Hinze, assistant professor, civil engineering department, University of Missouri-Columbia 249
Cosponsors to S. 2153 as introduced by Senator Schweiker 269
Fallacy of the "Safe" Workplace 563
Labor-Management Safety and Health Committees 67
Occupational Injury-Illness Statistics 69
OSHA Letter of Complaint by Employers Against Federal OSHA 71
Redraft of S. 251 as introduced by Senator Thurmond 275

Questions and answers:

Bingham, Eula, Assistant Secretary, Occupational Safety and Health, U.S. Department of Labor responses to questions asked by Senator Cranston 78
Department of Industrial Relations, State of California response to questions asked by Senator Williams (with attachments) 401

Page

- International Union, United Automobile and Agricultural Workers of America, UAW response to questions asked by Senator Williams 363
- Michigan Department of Labor response to questions asked by Senator Williams 450
- National Association of Manufacturers response to questions asked by Senators Williams 333
- Seyfarth, Shaw, Fairweather, and Geraldson, law firm of, response to questions asked by Senator Williams 476

Selected charts:

- Estimated percent distribution of firms by exemption status for years 1975, 1976, and 1977 (by industry)—Chart 1 39
- Estimated percent distribution of manufacturing firms by exemption status for years 1975, 1976, and 1977 (by firm size)—Chart 2 40

Selected tables:

- Ability of States to furnish information under S. 2153—Table I 41
- Coverage of workers under State workers' compensation programs—Table III 45
- Employee Complaints Against Federal OSHA 75
- Employer complaint tally 74
- Features of workers' compensation programs needed to provide data for S. 2153—Table II 42
- Federal and State Complaints 76

APPENDIX

- Food and Beverage Trades Department, AFL–CIO, Robert F. Harbrant, president 767
- International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Frank E. Fitzsimmons, general president 784
- Communications Workers of America, Glenn E. Watts, president 805
- Graphic Arts International Union, AFL–CIO, CLC, Leonard E. Adams, vice president 815
- Building and Construction Trades Department of the AFL–CIO, Robert A. Georgine, president 827
- United Paperworkers International Union, Wayne E. Glenn, president 837
- United Electrical, Radio and Machine Workers of America (UE), Boris H. Block, general secretary-treasurer 847
- National Federation of Federal Employees, James M. Peirce, president 857
- Roofing and Waterproofing Industry 861
- National Roofing Contractors Association 865
- National Cattlemen's Association, W. H. Webster, chairman, committee on labor 868
- American Farm Bureau Federation 875
- National Association of Farmworker Organizations 877
- Individual worker who wishes to remain anonymous (with attachments) 900
- Urban Environment Conference, Inc., and 24 National and local organizations, joint statement 915
- American Medical Student Association, Rocio Huet, president 923
- Philadelphia Area Project on Occupational Safety and Health, Curt Wible, chairperson 929
- Sierra Club 958
- Rothstein, Mark A., visiting associate professor of law, University of Pittsburgh 962
- Edison Electric Institute 999
- Electronics Committee on Occupational Safety and Health 1006
- Air Transport Association 1012
- Massachusetts Coalition for Occupational Safety and Health 1023
- Mendeloff, John, assistant professor, Department of Political Science, University of California, San Diego 1038
- American Public Health Association, William H. McBeath, M.D., M.P.H., executive director 1052
- Liberty Lobby, Robert Witt, legislative aide 1058
- Mayer, Henry C., chairperson, committee on public issues, Association for Social Economics 1066
- United States Brewers Association, Inc., Henry B. King, president 1069
- Associated Builders and Contractors, Inc. 1071

Page
Associated General Contractors of America ... 1078
Kanawha Valley Coalition on Occupational Safety and Health ... 1081
Society of the Plastics Industry, Inc ... 1086
National Association of Furniture Manufacturers, Frederick L. Williford, executive vice president ... 1102
Russell, Michael B., associate director, Southerners for Economic Justice, prepared statement ... 1103
Seyfarth, Shaw, Fairweather and Geraldson, law offices of ... 1108
American Textile Manufacturers Institute, Inc., W. Ray Shockley, executive vice president ... 1123
Motorola, Inc., Terry Cooper, assistant director of congressional relations ... 1125
Maytag Company, Sterling O. Swanger, vice president, manufacturing ... 1128
Aluminum Company of America, W. H. Krome George, chairman of the board 1135
Caterpillar Tractor Co ... 1140
Dresser Industries, Inc., R. W. Ytterberg, vice president, industrial relations ... 1145
AMAX, Inc., Bernard R. Roy, corporate director of loss prevention ... 1148
Counsel of Smaller Enterprises, a division of the Greater Cleveland Growth Association, George Palmer, chairman ... 1157
Chemical Manufacturers Association ... 1163

Page

[illegible]

American Textile Manufacturers Institute, Inc., W. Ray Shockley [illegible]

[illegible]

OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980

TUESDAY, APRIL 15, 1980

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The committee met, pursuant to notice, at 9:34 a.m., in room 4232 Dirksen Senate Office Building, Senator Harrison A. Williams, Jr. (chairman) presiding.

Present: Senators Williams, Nelson, Schweiker, Javits, and Hatch.

OPENING STATEMENT OF SENATOR WILLIAMS

The CHAIRMAN. We will come to order.

Good morning and welcome to the first day of hearings on various legislative proposals to amend the Occupational Safety and Health Act of 1970. These hearings are of very great importance to our future efforts to protect the health and safety of millions of American workers.

Over the past month, this committee has received an extensive education about the Occupational Safety and Health Act and about its implementation by the Department of Labor.

We have learned of the great strides the Department has taken in this administration, and under its current leadership, to make OSHA a fair and effective force for worker protection.

We have learned about productive new directions in worker education and in employer consultation, and about the development of labor-management cooperation in confronting and resolving hazards in the workplace. We know that this kind of cooperation is essential if we are ever to eliminate the hazards in our workplaces.

The record of our oversight hearings shows that safety and health hazards imperil not only workers and their supervisors; they also lessen productivity and endanger the American economy. Industrial accidents and diseases cost our Nation $43 billion per year in workers' compensation and health care payments, lost time, and lower productivity; a cost our economy cannot afford.

Of equal importance, we have learned that as a result of extensive education of workers and employers, America's working men and women have come to view OSHA as critically important to them and to their welfare.

In the spring of 1911, 69 years ago, an enormous tragedy occurred. Hundreds of workers, mostly women, were crammed together in a sweatshop in the garment district in New York City, in unbelievably squalid and unsafe conditions. A fire broke out. The fire escapes were inadequate, and the fire doors had been locked, in total disregard for safety, 146 workers perished, either burned to death, or killed when they hurled themselves from the 10th floor windows of the loft in which they were working.

The Triangle Shirtwaist factory fire marked a turning point in our Nation's industrial relations. And it marked a turning point in our Nation's consciousness about safety conditions in our workplaces.

Since that time, we have made great progress in improving safety and health protection for our workers. The enactment of our Federal law in 1970 was a landmark achievement, but we must continue to strive for still better worker protection.

That is why these hearings are of fundamental importance. The product of this committee's deliberations must not be a turning back. The legislative proposals pending before us must be closely examined to assure that any changes made by Congress are ones that move us forward toward our ultimate goal. That goal, which was laid out in 1970 is still our objective—to assure, so far as possible, that every working man and woman in the Nation enjoy safe and healthful working conditions—and to preserve our human resources.

There are several subjects for our hearings, Senator Schweiker, that I think we should mention. These hearings were scheduled to enable the committee to examine three proposals to amend the Occupational Safety and Health Act. These bills, S. 1486, S. 1572, and S. 2153, all would provide certain exemptions from the act, or from certain enforcement activities under the act to certain classes of businesses.

[The text of S. 2153, S. 1486, and S. 1572 follows:]

96TH CONGRESS
1ST SESSION

S. 2153

To amend the Occupational Safety and Health Act of 1970 to concentrate enforcement activities on hazardous workplaces and encourage self-initiative in improving occupational safety and health, and for other purposes.

IN THE SENATE OF THE UNITED STATES

DECEMBER 19 (legislative day, DECEMBER 15), 1979

Mr. SCHWEIKER (for himself, Mr. WILLIAMS, Mr. CHURCH, Mr. CRANSTON, Mr HATCH, and Mr. NELSON) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

---

A BILL

To amend the Occupational Safety and Health Act of 1970 to concentrate enforcement activities on hazardous workplaces and encourage self-initiative in improving occupational safety and health, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Occupational Safety and Health Improvements Act of 1980".

SEC. 2. The Occupational Safety and Health Act of 1970 is amended by inserting after section 4 the following new section:

"APPLICATION OF THIS ACT TO EMPLOYERS WITH A RECORD OF EFFECTIVE SELF-INITIATIVE ON OCCUPATIONAL SAFETY AND HEALTH

"SEC. 4A. (a)(1) Any employer who maintains a workplace which qualifies under the provisions of subsection (b) or (c) shall be exempt from all safety inspections and investigations with respect to such workplace carried out under section 8, other than inspections or investigations conducted for the purpose of—

"(A) determining the causes of a serious workplace accident which resulted in the death of one or more employees or hospitalization of more than one employee;

"(B) determining the existence of an imminent danger or other hazard so serious in nature that it warrants the expeditious attention of the Secretary without the Secretary first providing the notice and seeking the assurances required by subparagraph (c) of this paragraph, in response to information which gives the Secretary reasonable grounds to believe such a danger or hazard exists;

"(C) determining whether a violation exists in response to information which gives the Secretary reasonable grounds to believe a violation exists if the employer has first received notice from the Secretary of such information and has failed to provide to the Secretary satisfactory assurances that appropriate action, if any, has been taken to correct the violation; or

"(D) determining whether proper abatement of a violation previously cited during a permitted inspection or investigation has taken place.

"(2) Nothing in this subsection shall limit the authority and responsibility of the Secretary to take all actions authorized by this Act with respect to occupational health hazards, and with respect to any serious safety hazards which cannot be effectively identified by reference to occupational injury data as provided for in this section.

"(3) The scope of an inspection or investigation conducted pursuant to paragraph (1) or (2) shall be limited to the purpose of such inspection or investigation, but the Secretary may issue a citation and assess a penalty with respect to any other safety violation found during the normal course of conducting the inspection or investigation within such scope.

"(4) As used in this section, the term 'workplace' means a single physical location where business is conducted or where services or industrial operations are performed, except that for employers engaged in activities which are physically dispersed, the term 'workplace' includes all locations at which such services are performed by employees of the employer engaged in such activities. Where distinctly separate activities are performed at a single physical location, each activity shall be treated as a separate workplace.

"(b) For the purpose of identifying workplaces which qualify for the exemption provided in subsection (a), the Secretary shall enter into agreements with State workers' compensation or other appropriate State agencies under which the State agency will prepare and submit to the Secretary annually a listing of all employers (including any other necessary identifying information) within such State who during the preceding year had one or more occupational injuries as reported to such agency. Each such report shall include, at least, all occupational injuries which result in two or more lost workdays. Any workplace of an employer covered by the State workers' compensation law and the reporting requirements of the State workers' compensation law but not included in the listing submitted under this subsection qualifies for the exemption provided in subsection (a).

"(c)(1) Any workplace not qualifying for the exemption set forth in subsection (a) under subsection (b) qualifies for such exemption if during the preceding calendar year the workplace had no employee deaths caused by occupational injury and had a number of lost workday injuries which was less than or equal to the number specified in the following table:

Number of employees of the workplace:	Number of lost workday injuries:
1 to 25	0.
26 to 49	1.
50 to 99	2.
100 to 149	3.
150 to 249	5.
250 to 349	7.
350 to 449	9.
450 to 649	13.
650 to 999	20.
1,000 and over	2 injuries per every 100 employees.

For purposes of this paragraph, a lost workday injury shall be any occupational injury which results in one or more lost workdays, and the number of employees of the workplace shall be the average number of full-time employees (or their equivalent) during the preceding year. No sooner than three years after the effective date of this section, and at three-year intervals thereafter, the Secretary shall have the authority to revise the above table, within comparable standards, based on changes in the national average occupational injury lost workday case rate, as published by the Secretary.

"(2) Each employer wishing to claim qualification for the exemption provided in subsection (a) pursuant to this subsection shall file with the Secretary an affidavit under oath or affirmation stating that during the preceding year there were no employee deaths caused by occupational injury, the average number of full-time employees (or their equivalent) employed in the workplace, the number of occupational injuries which resulted in one or more lost workdays, and the maximum number of such lost workday injury cases under which workplaces of the size category of the workplace for which the affidavit is filed would be eligible, as provided by paragraph (1) of this subsection, for the exemption. The employer shall post a copy of this affidavit in a prominent place in the workplace.

"(d) The following provisions shall apply to penalties for serious and other than serious violations of a safety standard or duty:

"(1) No employer who maintains a workplace which qualifies for the exemption set forth in subsection (a) shall be assessed a penalty under section 17(b) or 17(c) for such a violation found in such workplace if—

"(A) the employer maintains at such workplace an advisory safety committee as described in subsection (f)(2) and a regular consultation program as described in subsection (g) to advise and consult with the employer on occupational safety and health matters; or

"(B) the employer at all times during the preceding calendar year employed not more than ten employees (in which case the period during which no penalties shall be assessed pursuant to this paragraph shall be from April 1 of the year following the calendar year for which the requirements for the exemption provided by subsection (a) have been met, until the following March 31).

"(2) No employer of a workplace which does not qualify for the exemption provided in subsection (a) but at which there is maintained an advisory safety committee as described in subsection (f)(2) and a regular consultation program as described in subsection (g) shall be assessed a civil penalty under section 17(b) which exceeds $700 or a civil penalty under section 17(c) which exceeds $300 for each such violation found in such workplace.

"(e) Except as provided in subsection (d)(1)(B), the exemption provided by this section shall be effective from April 1 of the year following the calendar year for which the applicable requirements are met until the following March 31, except that an affidavit filed pursuant to subsection (c) after such April 1 shall be effective five days after filing and until the following March 31.

"(f)(1) Any employer may consult with a workplace advisory safety committee for the purpose of increasing employee involvement in workplace safety and health matters and improving workplace safety and health conditions.

"(2) An advisory safety committee qualifies an employer for the penalty limitations provided by subsection (d) if—

"(A) the employer regularly consults with the committee and responds to the recommendations and advice of the committee;

"(B) the committee meets in accordance with a regular schedule established by the committee;

"(C) the committee has no more members selected by the employer, if any, than the number of employee members, except if otherwise provided in an applicable collective-bargaining agreement;

"(D) employee members are selected each year by the labor organization representing the employees, or if there is no such organization, by a selection process which gives all interested employees an opportunity to participate on the committee or in the selection of employee members of the committee; and

"(E) at the time of selecting employee members as prescribed under clause (D) of this paragraph, the labor organization, or if there is none, interested employees, have the right to choose not to participate on the committee, in which case the employer shall no longer qualify for the penalty limitations provided by subsection (d).

"(g) A consultation program qualifies an employer for the penalty limitations provided by subsection (d) if such consultation program—

"(1) is provided by—

"(A) approved State agencies pursuant to section 7(c)(1), section 18, or section 21(c),

"(B) private business concerns under contract with the Secretary for the purpose of this paragraph,

"(C) one or more employees of the workers' compensation insurance carrier of the employer, or of a private business concern, who are, with respect to safety matters, certified as safety professionals by the Board of Certified Safety Professionals, or licensed as professional engineers with a safety specialty by any State, or, with respect to health matters, certified as industrial hygienists by the American Board of Industrial Hygiene,

"(D) any other individual or private business concern meeting such competency requirements as the Secretary shall establish for the purpose of carrying out this subsection, or

"(E) any combination of methods prescribed by subclauses (A) through (D) of this clause;

"(2) includes a review of all conditions in the workplace significantly relating to occupational safety or health during the year of qualification, or during such other time period as the advisory safety committee described in subsection (f)(2) may specify; and

"(3) includes written reports to the employer of the findings made as a result of consultations, together with such recommendations as may be appropriate, and provide for the furnishing of such reports to the advisory safety committee described in subsection (f)(2).

"(h)(1) Every employer claiming qualification for the provisions of subsection (a) or (d) shall maintain records in an orderly manner to assure verification. The Secretary shall have access to such records. Such records may consist of injury records maintained pursuant to section 8(c), appropriate workers' compensation records, documentation with respect to the number of employees at such establishment, minutes of meetings of the advisory safety committee, evidence of the procedure used to select employee members of the advisory safety committee, verification of transmittal of written reports of the consultant, and other necessary and proper information maintained in the normal course of business.

"(2) If the Secretary finds a workplace for which the provisions of subsection (a) or (d) are claimed does not qualify, the Secretary shall rule the workplace not qualified and shall notify the employer of such ruling. Such a ruling may be reviewed only by the Occupational Safety and Health Review Commission and a court of appeals of the United States in accordance with the provisions of sections 10 and 11, and only in conjunction with the contesting of a citation, abatement order, or proposed penalty.

"(3) No report or recommendation of a consultant or advisory safety committee provided pursuant to this section, or assurance by the employer pursuant to subsection (a)(1)(B), shall be considered as evidence that a violation of this Act was willful within the meaning of section 17 (a) or (e) if the employer had a reasonable, good faith belief that the condition involved in such report, recommendation, or assurance, subsequently determined by the Secretary to be a violation, was not a violation of this Act.

"(4) Notwithstanding any other provision of law, no claim of liability for an occupational illness or injury may be asserted against any advisory safety committee or provider of consultation services or against any member or employee of such committee or consultant based on any activity, relationship, or breach of duty within the scope of functions of such committee, consultant, or individual required or authorized pursuant to this section.

"(i) In order to carry out the purpose of this section, the Secretary shall—

"(1) provide financial, technical, and administrative assistance to appropriate State workers' compensation agencies or other appropriate State agencies to assist such agencies in making necessary modifications to procedures in order to carry out the purpose of subsection (b);

"(2) report to Congress before July 1, 1982, on the participation of States under subsection (b), together with an explanation of any difficulties in obtaining the participation of all States and recommendations for eliminating any such difficulties;

"(3) advise employers and employees of the provisions of this section, including current information on the qualifications for the exemption provided by subsection (a) and the penalty limitations provided by subsection (d), and on inspection activities in which the Secretary may engage pursuant to paragraph (2) of subsection (a), through general information programs, individual notice during onsite inspections, investigations, and consultations, and other practicable means;

"(4) require inclusion of the provisions of this section, or of similar provisions at least as effective in accomplishing the purposes of this section, for approval of a State plan submitted pursuant to section 18(b);

"(5) develop, with the cooperation of State workers' compensation or other appropriate State agencies, other appropriate means to identify workplaces which qualify for the exemption set forth in subsection (a) by increasing utilization of State workers' compensation data, and shall have the authority to implement such means, within standards comparable to those set forth in subsection (c)(1), as an alternative to the affidavit process set forth in subsection (c)(2); and

"(6) explore other appropriate means to encourage voluntary self-initiative in workplaces to improve safety and health conditions, utilizing advisory safety committees, consultation programs, and other methods, including a voluntary program of self-certification of compliance with safety and health standards and duties, and shall include in the Secretary's annual report required by section 26 a report on activities carried out pursuant to this clause.".

SEC. 3. Section 23 of the Occupational Safety and Health Act of 1970 is amended by adding at the end thereof the following new subection:

"(i) The Secretary is authorized to make grants to the workers' compensation agency or other appropriate State agency of any State which is participating or preparing to participate under section 4A(b) for the purpose of assisting such State agency to improve its program of administration of the State workers' compensation program, particularly with reference to utilization of mechanized claims processing and information retrieval systems and in connection with activities under section 4A(i)(5). There is authorized to be appropriated for the purpose of this subsection for each fiscal year until the end of fiscal year 1985 the sum of $5,000,000.".

SEC. 4. The amendments made by section 2 and section 3 of this Act shall take effect January 1, 1981.

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96TH CONGRESS
1ST SESSION

S. 1486

To exempt family farms and nonhazardous small businesses from the Occupational Safety and Health Act of 1970.

IN THE SENATE OF THE UNITED STATES

JULY 12 (legislative day, JUNE 21), 1979

Mr. CHURCH (for himself, Mr. BOREN, Mr. HAYAKAWA, Mr. ROTH, Mr. DOMENICI, and Mr. ZORINSKY) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

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A BILL

To exempt family farms and nonhazardous small businesses from the Occupational Safety and Health Act of 1970.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Occupational Safety and Health Amendments of 1979".

SEC. 2. (a) Section 3 of the Occupational Safety and Health Act of 1970 is amended by inserting at the end thereof the following:

"(15) The term 'nonhazardous business' means any business included within a category having an occupational injury/illness incidence rate which does not exceed seven per one hundred full-time employees as set forth in the 1976 Bureau of Labor Statistics survey of three-digit Standard Industrial Classification Code industries, and for each subsequent year.".

(b) Section 4 of the Occupational Safety and Health Act of 1970 is amended by redesignating subsection (b) as subsection (c), and by inserting after subsection (a) the following new subsections:

"(b)(1) This Act shall not apply to any person who is engaged in a farming operation and employs ten or fewer employees.

"(2) This Act shall not apply to any person who is engaged in a nonhazardous business and employs ten or fewer employees.".

○

96TH CONGRESS
1ST SESSION

S. 1572

To exempt family farms from the Occupational Safety and Health Act of 1970.

IN THE SENATE OF THE UNITED STATES

JULY 25 (legislative day, JUNE 21), 1979

Mr. HELMS introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

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A BILL

To exempt family farms from the Occupational Safety and Health Act of 1970.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Family Farm Occupational Safety and Health Amendment of 1979".

SEC. 2. Section 4 of the Occupational Safety and Health Act of 1970 is amended by inserting after subsection (b) the following new subsection:

"(c) This Act shall not apply to any person who is engaged in a farming operation, does not maintain a temporary labor camp, and employs ten or fewer employees.".

○

The **Chairman**. During our oversight hearings which preceded the hearings on legislation which we begin today, there was some considerable discussion of the provision of the current law contained in section 10 of the act dealing with delays in the abatement of hazardous conditions pending the administrative and judicial appeal from citations and proposed penalties. There are also pending before the committee two bills, S. 251 and S. 270, which deal with this area, and which provide for Government reimbursement of litigation expenses for employers who successfully appeal citations and proposed penalties. Since this has become an issue, I think it makes sense for the committee to receive testimony, to receive evidence on these proposals also during these legislative hearings.

So that is the panoply of legislation before us.

After we have heard from Senator Schweiker, we will of course be very anxious to hear from Doctor Bingham again now on legislative proposals.

Senator Schweiker.

OPENING STATEMENT OF SENATOR SCHWEIKER

Senator **Schweiker**. Thank you, Mr. Chairman. Over 1 year ago I decided to try to develop responsible legislation to improve the Occupational Safety and Health Act.

I did this for two main reasons. First, as a consistent supporter of an effective OSHA, I have been disappointed at its very limited results. Since we have had OSHA, the rate of lost workday injuries has increased 25 percent. And in the last 2 years, Bureau of Labor Statistics data show increases in every measurement of worker fatality and injury rates.

Second, in the past several years, Senate consideration of OSHA has been wrested away from this committee, and cast in terms of unrefined floor amendments, which often have been inconsistent with the purposes of the act. I felt this committee had a duty to respond responsibly to the Senate mandate for definitive OSHA policy direction.

I therefore set out to develop legislation which would merit the support of public groups long polarized over OSHA. The bipartisan cosponsorship for S. 2153 evidences the sincerity and partial success of this effort.

But it appears we have not yet bridged that bitter polarization. Discussion of S. 2153 in some quarters has been guided by hysterical rhetoric.

Even Assistant Secretary Bingham got into the swing of things by telling a labor audience, as quoted by the Milwaukee Journal, that S. 2153 is a Republican bill, and that "the pen that wrote this bill is as deadly as any pistol."

Mr. Chairman, the extensive hearings you have scheduled, which begin their second phase today, are giving us the opportunity to go back to square one and rationally work through the main issues dealt with in S. 2153.

The first issue is targeting of OSHA inspection resources, where there is much room for improvement. Two out of every three inspections misfire; they find no serious hazards. Since we know there are many hazardous workplaces, it is obvious we are not adequately zeroing in on them.

In addition, both President Carter's Interagency Task Force on Workplace Safety and Health and the General Accounting Office report on OSHA complaint procedures recommended substantial changes in the ways OSHA decides who to inspect. President Carter's Task Force recommended targeting routine safety inspections on individual workplaces with poor safety records, rather than OSHA's present system of general industry targeting. Furthermore, both the President's Task Force and the GAO recommended a screening procedure to try to resolve most employee complaints without the need for an inspection.

Our oversight hearings presented a strong consensus from representatives of Government, labor and business that inspections should be targeted as precisely as we can to get to high-hazard workplaces.

This is what S. 2153 attempts to do, to target routine safety inspections to the 10 percent of workplaces with more frequent injuries. OSHA can only inspect about 2 percent of all workplaces, and about one-half of 1 percent by routine safety inspections. Even including all State agency inspections, only a small fraction of workplaces can be reached. With such limited resources, we cannot afford haphazard targeting.

To further improve inspections targeting, S. 2153 would also implement the screening procedure recommended by the GAO and the President's Task Force, and partially adopted by OSHA, for handling employee complaints. The purpose and effect of this procedure is to unclog the system of complaints which can be resolved without an inspection.

At the same time, the bill protects workers by providing for an immediate inspection for imminent dangers and other urgent problems, and by providing for an inspection for less serious complaints if they are not otherwise resolved.

By providing for needed complaint inspections, the bill preserves the preventive value of the threat of inspection in every workplace, regardless of size or safety record.

The second major issue in S. 2153, Mr. Chairman, is to encourage safety committees and consultation programs. Again, in our oversight hearings, we had much testimony from labor, business and Government representatives on the usefulness of these programs. The weight of that testimony was that where management and labor are willing to work together, where they have information on hazard recognition, and where OSHA enforcement remains available, safety committees are productive.

This is what is proposed by S. 2153. It encourages safety committees where labor and management are willing to work together. It provides expert, objective advice to both sides from outside consultants. It preserves OSHA enforcement for complaints when problems have not been resolved by the committee. And it fully preserves tough penalties for willful violations where employers unreasonably ignore safety committee recommendations.

The incentives for establishing a safety committee and consultation program are penalty limitations. For nonhazardous workplaces with these programs, routine, first-instance penalties will be waived. The present maximum penalty is $1,000. In practice, the average serious penalty is about $500, and the average nonserious penalty is about $100.

These provisions of S. 2153 have been criticized on the grounds that the incentive is too much, and that the value of these penalties is greater than the value of a safety committee and consultation program. I hope this concern can be better explained at these hearings. At this point, it is not at all clear to me that the deterrent value of an average $500 serious and $100 nonserious penalty, coupled with the low probability of an inspection, will really be more effective in correcting hazards than an ongoing cooperative effort in the workplace, backed up by expert advice and by OSHA enforcement.

The third major issue, Mr. Chairman, is the mechanics of identifying workplaces with good safety records. S. 2153 seeks to do this in a two-step process. First, to minimize paperwork, employers with zero lost-time injuries reported to their State workers compensation agency will qualify as nonhazardous. This will provide a first rough cut, to screen out nonhazardous small businesses.

The second step is for workplaces with at least one lost-time injury, but with a rate significantly below the national average, to file an affidavit with OSHA stating their injury rate. As a protection against falsification, these affidavits must be posted in the workplace, and there are criminal penalties for lying of a maximum $10,000 and 6 months imprisonment.

Developing a reliable system of workplace-specific data is difficult. There is no perfect data system. But I believe we must develop the best system we can to put OSHA inspectors where we have evidence the greatest hazards are.

In my opinion, Mr. Chairman, OSHA's present system of targeting general industry categories rather than unsafe workplaces is not the best system we can develop, and the system proposed in S. 2153 would be a substantial improvement. There may need to be refinements to the bill, or there may be other ways to do it. I hope these hearings will help us develop this issue. But I also hope we will keep in mind the National Safety Council's advice during our oversight hearings that although there is now no perfect data system, we cannot afford to wait for one to appear.

Mr. Chairman, I hope these hearings will produce a rational discussion of these critical issues.

Thank you.

The Chairman. Thank you, Senator Schweiker.

Senator HATCH. Mr. Chairman, I was going to ask that my original statement be printed in the record.

The CHAIRMAN. That will be done, too.

OPENING STATEMENT OF SENATOR HATCH

Senator HATCH. Mr. Chairman, our oversight hearings on OSHA have for the most part confirmed that after 9 years of existence, there remains no convincing evidence the statute has improved the safety and health of employees. Moreover, the program has cost billions of dollars in administration plus untold billions required to be spent by businesses to comply. As a result, the act has created an unrivaled degree of antagonism among employers, and especially among smaller businesses which can least afford to resist OSHA's unreasonable enforcement efforts.

Clearly, OSHA has failed to protect the safety of the American work force. I believe we would be better off if we could all come to grips with that hard fact and to press for constructive change.

I am not suggesting, however, that the act be repealed or gutted, as some opponents of OSHA reform have claimed. Yet, I think our colleagues will agree that something must be done to refocus the efforts and priorities of the agency.

A better approach, in the interest of all concerned parties, is to channel OSHA's efforts where they are most needed and where they can be most effective. This is the idea Senator Schweiker and I had when we amended the last Labor-HEW appropriations bill to redirect OSHA's enforcement effort away from safe employers. This can be accomplished by employing a system of performance-based exemptions, whereby there are rewards for those employers with proven, responsible and successful safety programs.

These concepts are embodied in S. 2153 sponsored by Senator Schweiker, you, Mr. Chairman, and I along with other of our colleagues. S. 2153 is a positive step in OSHA reform. I am pledged to do everything possible to get a vote in the Senate this Congress because it is a meritorious concept whose time has arrived.

Critics of S. 2153 have wildly exaggerated and misrepresented the bill's impact. Senator Schweiker is to be commended for maintaining his cool despite some outrageous remarks and activities on the part of some of those who would kill this effort. Unlike many earlier efforts to amend the annual Labor-HEW appropriations bills, S. 2153 is not a blanket exemption based soley on business size, although the bill would relieve many small businesses from nonproductive, routine safety inspections. The bill would not increase the risk of worker injury or excuse safety violations during the period of exemption, as some opponents claim. And, it would not permit business firms to ignore OSHA safety standards and regulations. Instead, S. 2153 would promote industry's workplace safety efforts by exempting those business firms that can document good safety performance.

S. 2153 is not a cure-all for all of OSHA's problems. It is not being billed as the quick fix. Many will say the bill does not go far enough and fast enough to redress OSHA's dismal record. They are not totally wrong. But it is a compromise and a good start to permanent change. S. 2153 bridges the gap between those of our colleagues who desire OSHA extinction and those who think business at OSHA as usual is great.

Passage of S. 2153 would reduce congressional pressure for OSHA reform by way of appropriations riders; it would relieve safe business firms from needless routine inspections; and it would reduce the adversarial posture and policies of an agency that has become synonymous, with costly, yet ineffectual, bureaucracy.

The coalitions of Senators I have listed confirms the agency's failings and the necessity for changes. It signals a good opportunity before the Senate Labor and Human Resources Committee in the near future to deal with this regulatory tyrant and clip its wings. It is time to curb OSHA's abusive powers and put it on the right track. I am pledged to doing just that in the coming year.

Thank you.

The CHAIRMAN. Thank you.

Senator Cranston was unable to attend this morning's hearing. He is, of course, most concerned about the workplace safety and health program. His statement will be, without objection, included in the record at this point. I know he will be attending these legislative hearings, as his busy schedule permits.

[The prepared statement of Senator Cranston follows:]

PREPARED STATEMENT OF SENATOR ALAN CRANSTON

Senator CRANSTON. I am pleased that we are having hearings on S. 2153, the proposed Occupational Safety and Health Improvements Act of 1980.

In 1970, I was a sponsor of the landmark Occupational Safety and Health Act. I am a strong supporter of that act and want to do all I can to assure its effective implementation.

Today we are discussing legislation that would amend that act. I cosponsored this legislation for two reasons.

One, I saw this legislation as offering protection from the crippling OSHA amendments that have been added as riders each year to appropriations bills.

Two. I saw it as offering one way to target OSHA's limited resources toward the greatest threats to workers' safety.

Each year for the past 4 years, amendments have been adopted on the Labor-HEW Appropriations Acts that have limited the enforcement authorities of OSHA. I believe it is certain that there will be more anti-OSHA riders—and that these will be approved—unless those of us who want to retain the protections of OSHA act responsibly recognizing some problems in administering the program and take appropriate remedial action.

The major problem in administering the OSHA program has been for OSHA to find ways to utilize its limited resources in the most efficient way in order to protect the worker and assist the employer in providing a safe workplace. In the oversight hearings just concluded, we have heard of the mechanisms OSHA has put in place for targeting its scheduled inspections at the most hazardous industries.

S. 2153 offers a mechanism for focusing this targeting at the most hazardous workplaces.

I recognized that a number of concerns have been raised about its reliance on workers' compensation data to achieve that objective.

California is currently experimenting with such a system. And it holds great promise. However, questions have been raised as to whether all the States have comparable workers' compensation data system. For that reason, I recently met with Dr. Bingham and asked that the Department of Labor research the existence and and adequacy of workers' compensation data for this purpose. In that effort, I asked the Department also to determine if there are other safety data systems that offer a feasible mechanism for targeting OSHA inspections to the least safe workplaces.

I followed up on these suggestions in connection with the recent oversight hearings on OSHA.

I am delighted that Dr. Bingham was sympathetic to this request and indicated she would explore my suggestions.

I believe the series of hearings starting today will tell us of the experience of those States that are using worker's compensation data. We also need to know about the existence of other reliable safety data in other States that might present a feasible option for targeting scheduled OSHA inspection.

I believe, however, that we must be very cautious in utilizing such data as a means of exempting a workplace from scheduled inspections. The effect of such action might be that some employers, knowing that their safety records would exempt them from an inspection, might grow lax in enforcing safety standards and a needless injury or disabling accident might occur. At this point, I thus do not believe that the reliability of the data available justifies its use beyond targeting scheduled inspections.

Furthermore, I believe we must explore mechanisms for gaining the trust and support of employers for enforcing safety standards and for working with their employees and with OSHA in assuring hazard-free workplace.

The oversight hearings this committee has held throughout the last several weeks have demonstrated substantial achievements under the act in obtaining this corporation and have demonstrated the major improvements achieved in making the workplace safe.

The hearing we are starting today will show us how to build upon that record; how to make the workplace as safe as possible; and how to do so in a way that elicits the support and cooperation of the employer.

The **Chairman**. We now start our legislative hearings appropriately with Dr. Eula Bingham, who directs the Occupational Safety and Health Administration.

STATEMENT OF DR. EULA BINGHAM, ASSISTANT SECRETARY OF LABOR FOR OCCUPATIONAL SAFETY AND HEALTH, ACCOMPANIED BY BASIL WHITING, DEPUTY ASSISTANT SECRETARY FOR OSHA; NIK EDES, DEPUTY UNDER SECRETARY, LEGISLATION; AND BENJAMIN W. MINTZ, ASSOCIATE SOLICITOR FOR OCCUPATIONAL SAFETY AND HEALTH, DEPARTMENT OF LABOR

Dr. **Bingham**. Thank you, Mr. Chairman. I would like to introduce the individuals at the table with me. To my right is Mr. Nik Edes, Deputy Under Secretary for Legislation in the Department of Labor; to my immediate left is Mr. Ben Mintz, who is Associate Solicitor of Labor for Occupational Safety and Health; and to his left is Mr. Basil Whiting, who is Deputy Assistant Secretary for Occupational Safety and Health.

Mr. Chairman and other members of the committee, it is a pleasure to appear today to address three legislative proposals that have been put before this committee: S. 1486, S. 1572, and S. 2153. OSHA shares the concerns reflected in these bills that resources be used as efficiently as possible to improve workplace safety and health. With only one inspector for roughly 1,700 workplaces, and with one in every 11 workers injured on the job each year, we recognize the need to focus compliance resources where they will do the most good, and welcome any suggestions to achieve this objective. However, it is the administration's view that these bills are not productive in this regard. Indeed, they are counterproductive and the administration firmly opposes their enactment.

OSHA in the past 3 years has demonstrated its firm commitment to making a reality of the promise that the Occupational Safety and Health Act of 1970 holds out to all Americans a safe and healthful working environment. At the same time, the agency has demonstrated an equally firm commitment to accomplish this goal while reducing unnecessary burdens on employers.

Our purpose today is to strengthen understanding of how these objectives can be achieved without violating the integrity of the act and its day-to-day application to workplace hazards.

The legislative proposals before this committee seek to exempt from various provisions of the act certain categories of workplaces: on the basis of their workforce size, their nature, or their injury rates. All three bills are based in part on the premise that by exempting these categories of workplaces from at least some OSHA inspections, agency resources would be freed to focus more tightly on more hazardous workplaces, with an ultimate benefit for workers as a whole. Since 1977 OSHA has focused its compliance efforts on the most hazardous industries. While we support the goal of improved inspection targeting, this administration takes strong issue with the notion of any legal exemptions from the act. There is a fundamental difference in philosophy between a legislated exemption and an administratively determined and adjustable allocation of resources—or targeting scheme. The likelihood of an inspection should vary with the hazardousness of the workplace, but the possibility of an inspection should always exist.

There is a parallel here with the enforcement of motor vehicle and traffic safety regulations, fire protection regulations, food sanitation standards, other public health and safety laws and, indeed, our basic income tax laws, which most citizens obey to a degree that astonishes the rest of the income taxpaying world. The majority of individuals and companies covered comply with such laws, but nevertheless the need for comprehensive coverage and the ever present potential for enforcement is universally acknowledged. No one here would want to eat in a restaurant exempted from the possibility of occasional visits by local health officials or wish to live in a neighborhood exempted from the possibility of intermittent police patrols. No one in this room operates under the assumption that his or her tax return is the one that will not be selected for an IRS audit, though some of us feel more likely to undergo that scrutiny than others.

Public agencies exercising such authorities or providing such services have limited resources. To insure these resources are allocated properly, those agencies are subject to constant scrutiny and oversight. They are expected to exercise fairness and the best possible judgment in making allocation decisions based on the information available to them. But this is not the same thing as an exemption.

Exempting a class of employers by law from OSHA to any extent would destroy the all important principle of universal coverage. The supporters of these proposals point to the fact that OSHA inspects less than 4 percent of all workplaces. But not every individual employer need be visited by OSHA for its regulation to be effective. The invisible reach of a law that establishes duties and obligations applying equally and uniformly to all employers and all workers assures that the beneficial impact of OSHA will extend beyond these few establishments inspected.

Formal exemptions are unwise public health policy. In fact, the bills before you would create two classes of workers—one entitled to full protection under the law, the other relegated to second-class status. To make a distinction on the basis of past safety records of industries and individual firms is particularly unsupportable. The fact that an airplane did not crash last year is not sufficient reason to exempt it from Federal aviation safety surveillance. Just because a driver had no traffic fines or accidents the previous year is no reason to exempt him from traffic regulations, routine traffic police surveillance, or annual motor vehicle inspections. Similarly no statistical analysis yet devised of past experience can assure workers that their workplaces are safe while they are working in them. Only the possibility of current enforcement action—however remote—can come close to providing that assurance.

The other point that needs to be stressed is that rigid, complex, litigious statutory exemptions cannot take the place of commonsense administrative procedures and instructions in continuously accommodating the agency's activities to the infinite variety of circumstances in America's changing workplaces. The strength of the Occupational Safety and Health Act of 1970—indeed its essence—is to provide for a full variety of tools by which OSHA can promote employer and employee efforts to eliminate hazards, in any kind of workplace, through whatever means suit the situation. To seek classification of the potential variety of situations by statute, and establish by law the tools appropriate for each, is to substitute litigation, confusion, and administrative expense for committed, reasonable efforts to achieve hazard abatement.

Let us now move from these fundamental problems to an analysis of the particular problems in each of the three bills before us.

S. 1572, the "Family Farm Occupational Safety and Health Amendments of 1979" would exempt from the act's coverage "any person who is engaged in a farming operation, does not maintain a temporary labor camp, and employs 10 or fewer employees."

There is little doubt that Congress has considered the family farm worthy of special treatment on certain occasions. OSHA too, from its earliest days, has by regulation established a policy of not inspecting farms where the only employees are the members of the immediate family of the so-called employer. In considering this legislation, however, there are several things which need to be kept in mind:

Agriculture is the third most hazardous industry in this country, with an estimated rate of 54 deaths per 100,000 workers in 1978 according to the National Safety Council—and in fact, concern about the extent of this problem was among the rationales advanced in 1970 in the Congress for passage of comprehensive occupational safety and health legislation; 97 percent of all farms and 56 percent of all farmworkers would be permanently exempt from OSHA coverage under this bill;

The hazards faced by more than 1 million workers on the small farms in this country are essentially the same as the hazards faced by employees on larger farms; and

On some small farms not all employees are members of the same family. National Safety Council data show that hired workers have higher injury rates than family members. This bill, then, is not really just for family farms.

Moreover, on any small farm the number of workers employed will vary from season to season. In addition, many small farms engage in hazardous nonagricultural operations. A statutory exemption based on such fluctuating circumstances is likely to lead to even more paperwork, recordkeeping, and litigation. It would also largely deny to these farms highly desired consultation and training efforts in which OSHA cooperates with other Federal agencies to bring information to farm employers and employees.

OSHA has six specific standards directly applicable to safe and healthful farmworking conditions including: storage and handling of anhydrous ammonia, rollover protection structures—ROPS—and agriculture machine guarding.

For these standards, the need for OSHA coverage is abundantly clear. The fatality rate for tractor overturns was 4.4 deaths per 100,000 tractors in use in 1977, according to the National Safety Council. This same data source shows that in 1977, 15 percent of finger injuries from farm machinery accidents were amputations.

The ROPS standard and the machine guarding standard could well prevent many of these casualties on small farms, but unfortunately have not been allowed a chance because of a rider attached to our annual appropriation every year beginning with fiscal year 1977, a rider this bill would make permanent.

The administration has consistently opposed the rider, and strongly disagrees with the argument that since workers on the Nation's small farms have lived with this exemption since 1976, it might as well be put permanently into the law. The act's full authority should be restored and maintained. It is worth noting that States which administer their own job safety and health programs are not bound by this rider, provided they use their own funds. And in fact California and Oregon do exercise this discretion and continue to inspect small farms.

S. 1486, the "Occupational Safety and Health Amendments of 1979" would remove from the act's coverage any person engaged in a farming operation with 10 or fewer employees; however, unlike S. 1572, related temporary labor camps would also be excluded. Further, this bill would remove so-called nonhazardous businesses with 10 or fewer employees from all provisions of the Occupational Safety and Health Act, including both safety and health inspections, investigations of worker complaints, and of accidents and fatalities, consultative assistance, and education and training programs.

The test of exemption for small businesses would be their inclusion, according to the Government's standard industrial classification codes, in a three digit industrial category having an annual injury-illness rate of seven or less per 100 full-time workers.

As a guideline for targeting inspections, standard industrial classification injury rates are useful, and they are used in the present high hazard system, as explained in some detail in Deputy Assistant Secretary Whiting's March 21 testimony. As definitive categories for purposes of an exemption, however, injury rates by SIC are misleading and inappropriate.

This bill would exempt 1.6 million establishments and 5.2 million employees from the act's protection and services.

High risk workplaces may be hidden in supposedly nonhazardous industrial categories with low injury-illness rates. For example, under the provisions of S. 1486, window-washing services would erroneously be considered nonhazardous because such services are classified under a SIC category with a low injury-illness rate. Thus, under this bill, workers perched on swinging scaffolds high over city streets could not look to OSHA for protection.

Since injury-illness rates do not accurately reflect the consequences of serious health hazards—such as harmful exposure to substances causing chronic pulmonary disease, kidney failure, or cancer—small industrial chemical, petroleum refining, and printing companies—all in SIC categories where the BLS injury-illness rate is less than seven—could also mistakenly be considered nonhazardous under S. 1486 and be exempted from OSHA safety and health coverage. Even the most seemingly hazard-free industries have workers exposed to very serious hazards that would be camouflaged by the overall rate—for example, building maintenance workers exposed to PCB's, electrical shock hazards, and so forth.

The data on which injury-illness rates are calculated by SIC are not reliable enough at present in some sectors to insure the reasonable accuracy of exemption determinations. To insure such accuracy would require an increase in the sample size and the consequent burdens on both employers and the Department of Labor.

The formula for exemption in S. 1486 fails to take into account differences in degree of hazard in individual establishments. A firm in a SIC category that has a low injury rate may nonetheless have an individually high rate, and thus pose serious hazards to the health and safety of its workers for a variety of reasons. Although under S. 1486, such a firm would have to be presumed safe, many of its workers might be subject to a high degree of risk. In fact in 1978, 120 fatalities and 190,000 injuries occurred in those firms which would be exempted under this bill.

OSHA would be unable to provide an exempted workplace with consultation and education services. It would be unable to respond to an employee complaint about a specific hazard, and unable to protect an employee under section 11(c) of the act who suffered reprisals for refusing to choose between his life and his job, or for engaging in other safety related activity.

Finally, the bill would give undue weight to the size of a business as a justification for exemption. It would ignore the significant safety and health problems that are found in small establishments. While many small businesses as a group have lower injury rates than larger firms, it is worth noting that a worker is at least twice as likely to be killed on the job in a small business than in a large one. It is necessary to recall the obvious truth that an employee's life should be worth no less simply because he or she works in a small business or on a small farm.

The report of the House Small Business Committee, which held extensive hearings on the impact of OSHA on small business in 1977, is instructive on S. 1486. The committee heard testimony for 4 days from a wide variety of witnesses, including small businesses, trade associations, Government officials and others. It is particularly interesting to note their comment that "every business association representing small businessmen testified at the hearings against expanding present exemptions, each with a unique line of reasoning." (Report No. 95-757, page 22.)

Concern was expressed, for example, that such an exemption would promote discharge for the "eleventh" employee to gain advantage of the exemption, and in general promote unfair competition. After careful consideration, the 37 members of the House Small Business Committee unanimously recommended that Congress "continue to oppose further exemptions from coverage of the OSH act by size of business."

The third proposal before the committee, the "Occupational Safety and Health Improvements Act of 1980," needs to be examined in great detail. Although many apparently believe that S. 2153 might be an acceptable solution to their concerns about OSHA's compliance practices, they are unfortunately incorrect. Despite its complex detail, the bill remains an exemption scheme, with the problems previously described as inherent in such a scheme as well as some unique problems of its own.

S. 2153 would exempt certain businesses, regardless of size, from programmed, or general schedule, "safety" inspections. OSHA would still be permitted under the bill to make a safety-related inspection in an exempted workplace in response to a serious accident involving hospitalization of two or more workers, a fatality, or an imminent danger or other hazard so serious in nature that it warrants the expeditious attention of the Secretary. The agency would also be allowed to make followup visits to check on the abatement of violations cited in previous, permitted inspections. An on site investigation based on a worker's complaint or other information about a safety hazard would be permitted in an exempted workplace, but only if the employer had first received notice of the complaint and had failed to provide "satisfactory assurances that appropriate action, if any," had been taken to correct the violation. The bill would allow the Secretary discretion to exercise his authority "with respect to any serious safety hazards which cannot be effectively identified by reference to occupational injury data."

S. 2153 would also impose several broad restrictions on OSHA's authority to assess civil monetary penalties for serious and other-than-serious safety violations found on those inspections permitted under the bill. The restrictions would vary with the establishment involved. Those small businesses (with 10 or fewer workers) exempted from programed safety inspections would also be exempt from civil monetary penalties for any safety violations found in the course of permitted inspections.

The bill would provide the same exemption from civil monetary penalties for larger exempted firms if they maintained both an advisory labor-management safety committee and a "regular" consultation program meeting requirements set forth in the bill. For nonexempt employers, large or small, the bill would restrict civil monetary penalties to $700 for each serious safety violation and to $300 for each nonserious violation, provided they maintained the prescribed advisory safety committees and consultation programs.

The test used in the bill to qualify workplaces for the exemptions is an individual workplace's lost workday injury record for the preceding calendar year. Lost workday injuries—those injuries resulting in time away from work—would be counted rather than all injuries, on the supposition that days away from work represent a truer measure of workplace hazard. The bill envisions that this information would be obtained in most cases from State workers' compensation agencies.

If an employer covered by workers' compensation reported no lost workday injuries in a particular year in workers' compensation reports submitted to State authorities, and the States make that data available to OSHA, the employer would be "rewarded" for that good safety record with an exemption in the following year. A lost workday injury for this purpose would be any injury causing 2 or more days of lost work. An employer who had any such lost workday injuries would still be eligible for an exemption if the employer filed an affidavit affirming that the actual number of lost workday injuries was low enough to meet a separate test set forth in the bill. The test varies with the business size but it is always 4 or fewer lost workday injuries per 100 employees, the national average rate.

With respect to the affidavit, however, a lost workday injury is any injury causing 1 or more days of lost work. If a State did not, or could not, provide workers' compensation reports to OSHA, the entire system would be predicated on these affidavits.

Using the criteria in the bill, the Bureau of Labor Statistics has estimated that nearly 4 million, or 91 percent of the business in this country, would qualify for an exemption under S. 2153. Forty-three million working men and women, or 65 percent of the workforce covered by OSHA, would be affected.

S. 2153 is predicated on two faulty premises: That it is possible for purposes of enforcement to separate health and safety in the workplace, and that it is possible to improve upon detailed and flexible administrative procedures by casting different, equally detailed provisions in statutory concrete.

It is difficult, if not impossible, to characterize any workplace problem as being exclusively one of health or safety. Clearly, hazards such as excessive noise or the lifting of heavy objects affect both the safety and health of workers. Then too there are the problems that result from repeated application to body structures of mechanical forces which exceed the allowable stress-level of tissues. Examples of such disabling injuries, which are very prevalent in the workplace, are tendonitis, tenosynovitis, carpal tunnel syndrome, and lower back syndrome. Even in the area of exposure to toxic chemicals, many employees would make the artificial distinction of characterizing acute exposure as a "safety" problem while chronic exposure would be called a health problem. In fact, when you really begin to examine the medical effect of "injuries" and "illnesses," they blur into a single continuum of bodily harm.

It can sometimes be useful for purposes of research or program development or administration to make ad hoc distinctions between "health" and "safety" in the workplace. We do it, for example, in programing inspections. However, programed "safety" inspections often bring potential "health" hazards to light.

In fact, this actually occurs in nearly 12 percent of our general schedule "safety" inspections; and in the case of potential asbestos exposure, roughly one-fourth of OSHA's investigations have been initiated by compliance officers on programed "safety" inspections. This opportunity would be lost under S. 2153 in exempt establishments.

One of the major objectives of the persons who worked to pass the act was the integration of safety and health concerns into a balanced program for the workplace. Prior to the passage of the act, there was a very distinct separation in professional education and practice between safety and health. This separation produced a dichotomy in the workplace where many problems were viewed by either safety or health professionals as falling into the other's area of responsibility. Consequently, many problems were not addressed adequately, or at all.

Further, there was a great deal of inefficiency in the use of professional resources because neither group was trained to recognize problems outside of their respective areas and make the necessary referrals to their counterpart. S. 2153 would have the effect of eliminating all that has been gained in integrating the approach to safety and health in the training of professionals and in the workplace.

Thus, while at present the act uses both the words "safety" and "health," it predicates none of its provisions on a distinction between them. Such a distinction, however, is central to S. 2153. To base OSHA's right of entry to workplaces on this distinction would affect both workers' "safety" and their "health," and would establish an extensive new area for genuinely nonproductive regulation and litigation.

As to the second faulty premise underlying this legislation—that it is possible to improve administrative procedures by writing detailed instructions into the statute book—let us begin by noting how the bill uses injury data.

S. 2153 would base its exemption scheme on a single year's injury record of a single workplace. The basic problem with this approach is that it rigidly focuses on the symptoms, for example, the actual occurrence of injuries, rather than their causes, especially physical hazards. Such hazards may lie in wait. A hazardous workplace may be injury-free because of pure fortuity. Most importantly, as a result of its focus on only those injuries which in fact did occur as a result of the hazards present, S. 2153 would divert employers' attention away from the "critical incidents" that occur, and which need to be evaluated to prevent future injuries. Our program is based on making employees sensitive to the hazards themselves, particularly the ones where there have been "close calls," and S. 2153 would undermine this approach.

Further, as a practical matter, reliance on these data would cause firms to move from exempt to nonexempt status over time, often on a yearly basis. Under S. 2153, for any one year, 91 percent of all firms would be exempt from inspections, but only 43 percent of all firms would be exempt for 3 consecutive years. In some size groups, the percentage of firms exempted for 3 consecutive years is even lower. Of firms with 100 to 499 employees, for example, only 23 percent would be exempt over 3 years. Many firms would change their status every year.

In the manufacturing sector, for example, 24 to 49 percent of the firms, depending on workforce size, would be exempt for only 1 or 2 years in a 3-year period. The constant change in status for many firms under the already complex procedures proposed by S. 2153 would confuse all concerned, and result in wasteful paperwork and litigation. Clearly, further research and experimentation on possible methods of establishment-targeting are the appropriate ways of proceeding rather than locking into law a rigid scheme based on inadequate data.

Let us look at how the system proposed by this bill would work in practice. As explained previously, the bill proposes a two-tiered method of determining a firm's record of lost workday injuries and thus its exemption from programed safety inspections: first, an automatic determination through State workers' compensation data; and second, through individual employer affidavits filed with OSHA.

The bill envisions minimizing recordkeeping and paperwork by having the Secretary of Labor enter into agreements with States to furnish data from workers' compensation reports already on file with State agencies. The Secretary would be required to provide technical, financial and administrative assistance to States wishing to modify their workers' compensation systems so as to be able to enter into such agreements. Those that agree to cooperate would provide OSHA with lists of employers who had reported 1 or more lost workday injuries in the preceding year. An employer not on such a list would be automatically exempted.

There are many obstacles to the use of State workers' compensation data for exemption purposes, even should the States choose to cooperate: Only two States could come close to furnishing the required complete list of employers, and even they would miss some small groups not covered by the compensation systems in those States.

Federal technical and financial assistance offered to States as an incentive to modify their workers' compensation systems voluntarily in order to meet the data requirements of the bill will doubtless prove inadequate to overcome the present gap, even over the 5-year period allowed in the bill.

Based on past experience, the Department believes that many of the State systems are unlikely to change unless mandated to do so, no matter how much money and effort is expended by Washington. BLS's present difficulties in obtaining full and uniform participation by all States and jurisdictions in its Supplemental Data System, despite years of effort, points out the difficulty of the task.

Even if State participation were mandated, and even were all State systems made uniform, not all lost workday injuries would in fact be reported under State reporting requirements. Consequently, employers whose workers had experienced a significant number of injuries might be exempt from OSHA safety inspections because their firms' names do not appear on lists drawn from these reports. For example, self-insured employers and carriers are not required to report certain uncontested workers' compensation claims in some States.

Also, many lost workday injuries that are not compensable or are not likely to be compensable may not be reported to the agency, and this circumstance will vary greatly from State to State depending on coverage limitations, benefit restrictions, and so forth. In fact, social security data reveal that only 67.3 percent of disabled workers applied for workers' compensation in 1974, because of, among other reasons: ignorance of the law; they may not know that they qualify for workers' compensation; desire to avoid the annoyance of a contested claim; preference for sick leave at full pay; treatment of an injury at the employer's expense, either at the worksite or at a nearby medical facility; or pressure from self-insured employers to forgo application for workers' compensation and seek recompense instead from accident-sickness insurance.

The consensus among Department of Labor experts and others familiar with the intricacies and vagaries of the various State workers' compensations systems is that very few States—possibly none—would be both able and willing to furnish adequate data to comply with the provisions of the exemptions proposed in S. 2153.

It is clear that any attempt to have a legal exemption from OSHA safety inspections based on data from State workers' compensation systems simply would not work.

The irony of this proposal is that while purporting to make more efficient use of agency resources, the bill would require that a significant portion of future agency resources be devoted to administration of the exemption system, and would result in an increase in paperwork both for the agency and small employers.

Verification of affidavits would be difficult, and would again require additional paperwork and investigative work in place of concentration on improving safety and health. Although OSHA could summon an employer's records much as the IRS does in auditing tax returns, on OSHA's case the task would be to check retrospectively the veracity of reports of nonevents—the absence of injuries. Therefore verification of such employer's reports would often inevitably involve visits to the worksite and discussions with employees.

The bill's proposed changes in the procedures for handling complaints would deprive workers of one of their fundamental rights under the act. Indeed, workers themselves have widely expressed the view that these provisions of the bill are the most threatening aspects in the entire proposal.

Taking as its point of departure the agency's new informal complaint policy instituted last September, the bill would, except in extreme circumstances, preclude OSHA from conducting a safety inspection of an exempt employer on the basis of a complaint, even a signed employee complaint involving a serious hazard, unless certain steps were taken first. Thus, OSHA could not respond to a worker complaint until the employer was notified and given a chance to explain or correct the alleged violation. Only if the employer failed to give "satisfactory assurances" of abatement would OSHA be entitled to make an onsite inspection.

The bill would go well beyond present policy in significantly limiting OSHA's right to respond to employee complaints. In the first place, OSHA's current policy of seeking abatement assurances from an employer before an inspection is conducted applies only to informal complaints. An informal complaint is one not in writing or not filed by workers. Under present policy, OSHA in most cases responds by onsite inspection to formal complaints. This difference in treatment accorded to formal complaints is not based only on adherence to the requirements of the statute. Rather, it derives from and embodies a fundamental policy judgment: if an employee actually working in the plant and exposed on a daily basis to hazards cares about his safety and health sufficiently to write the Secretary of Labor about it, and is courageous enough to ask for direct help from OSHA by signing his name to the complaint, that employee deserves and should receive an onsite inspection if the complaint, in OSHA's judgment, appears to have merit.

Under the bill, however, this critical policy judgment would be overturned. Stated simply, in most cases workers would be unable to trigger an immediate OSHA inspection, regardless of the formality and the detail with which they prepare their complaints, and regardless of the fact that OSHA has judged the complaint as having merit. In our view, this change in procedures would foster that very employee criticism regarding occupational safety and health enforcement which this committee sought to avoid in providing explicitly for employee rights under the act. A likely result of this bill would be the drying up of a critical source of information to OSHA on the workplace hazards; workers would consider it not worth the trouble to complain.

It should be emphasized that under current policy OSHA does not inflexibly respond to all formal employee complaints. Under section 8(f)(1), an inspection must be made only if there are reasonable grounds to believe that a violation or danger exists. Field staff have been instructed even in the case of formal complaints not to inspect where the complaint is vague or unsubstantiated; if it deals with workplace conditions which have no "direct" or "immediate" relationship to safety and health; if the complaint is outside of OSHA authority; or if, on the basis of a recent inspection, OSHA decided that a hazard does not exist.

Moreover, priority in scheduling inspections in response to formal complaints is determined by the apparent degree of the hazard involved. Finally, it cannot be argued that responding to formal complaints is an inefficient use of our resources, since an inspector need spend no more time at the workplace than is necessary to determine the extent of the hazard alleged.

In short, the bill cannot be justified as giving OSHA needed flexibility in responding to formal complaints. To the contrary, the bill would deprive the agency of flexibility by prohibiting an inspection response to formal complaints except in egregious circumstances.

This bill goes beyond OSHA's present complaint policy in other significant ways that would pose serious practical difficulties for OSHA enforcement. Under our present policy, an inspection conducted in response to a complaint involving a high hazard industry may involve the entire workplace and not only the area which is the subject of the complaint.

Under the bill, this administrative discretion to inspect beyond the scope of the complaint has been eliminated. Further, the present complaint policy provides for OSHA followup inspection not only where employer assurances of abatement are not satisfactory, but also on a random sample basis to provide a meaningful incentive to employers to respond truthfully to notification letters. This authority for random monitoring of employer assurance letters is not provided by the bill.

The difficulty of legislating matters necessitating careful and flexible administrative guidance is clearly illustrated by the bill's treatment of consultation services and labor management committees. Under the bill, both consultation programs and labor-management committees are presented not as a means by which employers can improve workplace conditions, but as a means by which they might escape or reduce fines.

Moreover, a consultant need only submit a written report to the employer to bring about these results: No actual onsite consultation would be required, and employers would not even have to follow the advice received. This hardly promotes the kind of compliance assistance OSHA has been striving to provide.

While labor-management committees can be effective in encouraging employee participation and vigilance in workplace safety and health, the committees proposed in S. 2153 would be pale replicas of what such committees should be. Their advice would have no force. In fact, there could well be a disincentive under the bill for employees to cooperate in the formation of committees. A committee assures employers a limit on fines, but workers receive no concommitant assurance that workplace conditions will be improved by such a committee.

OSHA believes that such committees would be valuable and is actively looking for opportunities to promote careful research and demonstration projects in committee operation.

Mr. Chairman, there are a number of concerns about this bill not discussed so far, but which are nevertheless critical to the manner in which this legislation would operate. It is our view, for example, that S. 2153 would define "workplace" in such a way as to permit gerrymandering, so that some work areas might be exempt while other sites in the same plant would not be; or even worse, that highly hazardous areas might be masked by an overall low lost workday injury rate for the entire firm. The limits which the bill would impose on the scope of a permitted inspection in an exempted establishment would also raise uncertainties and be a source of unnecessary litigation and delay in getting hazards abated.

A further problem is that this bill would foster additional, unnecessary and costly litigation which would further delay abatement of workplace hazards.

Although the bill clearly intends that exemption issues be litigated only in enforcement proceedings, it would nevertheless be difficult to keep the issues arising under the bill from being raised in warrant litigation. Warrants must be based on administrative probable cause and that, in turn, is based on either a reasonable inspection program or evidence of violations. The targeting-related provisions of S. 2153 would be inextricably involved with issues of administrative probable cause. Warrant litigation, already complex and burdensome, would become even more so, again diverting agency resources from our real mission.

Gentlemen, I have spoken at length because the subject before us—changes in the occupational safety and health program—is a matter of utmost mutual concern which warrants our closest attention. While the administration firmly opposes these bills, their sponsors have, by introducing them, raised many questions that need to be raised about OSHA. They have directed our attention to: Our system of targeting inspections and allocating resources; actions that can be taken by the Government to encourage and reward good safety performance; and, encouragement of consultation programs and labor-management safety committees.

The Department has testified at some length as to what this administration has done since 1977, what it is planning for the future, and the groundwork it has laid for later administrations. But despite the degree of turnaround in the direction OSHA has taken in the past 3 years, there is much more still to be done.

It has not been lack of interest of inclination, however, that has kept the agency from pursuing more actively than it has some of the innovative approaches it is only now beginning to explore. It has been a question of priorities, of a commonsense approach of concentrating first on the most serious problems and the most critical health and safety hazards.

We are currently planning, and in some instances implementing, activities and policies in the following areas:

Tests of methods for targeting inspections more efficiently,

The use of spotcheck inspections to monitor abatement of hazards cited on earlier inspections or noted in complaints;

Further modification in penalty assessment procedures to maximize the correlation between the circumstances involved and the penalty, and to increase the incentive of employers to abate hazards;

Methods to better analyze the causation of accidents for use in standard-setting and enforcement;

Expanding and improving the quality of the consultative services now available in 50 States;

Encouraging exploration of the use of labor-management committees that can assume a key role in maintaining workplace safety and health; and

Further increasing awareness and vigilance on the part of both workers and employers through education and training.

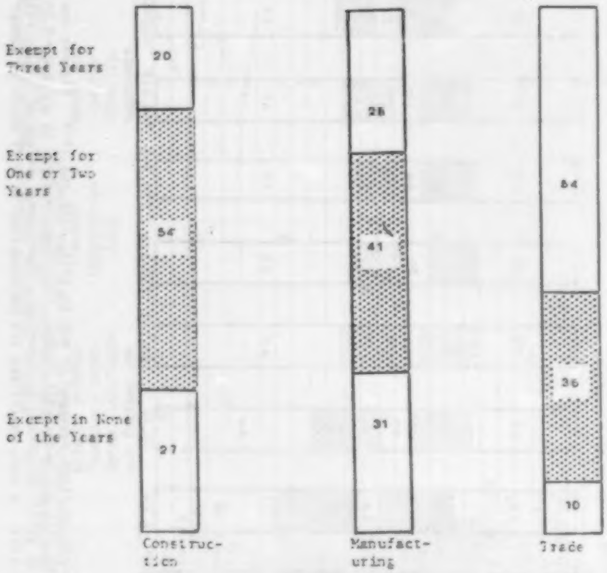
Mr. Chairman, we are coming to the end of the most extensive oversight hearings in the history of OSHA. We have appreciated this opportunity to review OSHA's progress and to examine areas of the occupational safety and health program where improvements may be made. The record of the past, as it has unfolded in these hearings, and the questions in our discussions have been helpful in directing attention toward those elements of the OSHA program that hold out the greatest potential for achieving the objectives of the act. We welcome the continued interest of this committee in OSHA's policies and programs. We have worked well with you in the past and look forward to working with you in the future to develop and improve the OSHA program. But in seeking to improve, we might well remember the line from Shakespeare's "King Lear:" "Striving to better, oft we mar what's well."

Thank you. I would be happy to answer any questions you might have.

[Additional material supplied for the record by Dr. Bingham, follows:]

Chart 1

Estimated Percent Distribution of Firms
by Exemption Status for Years 1975, 1976, and 1977*
(by industry)



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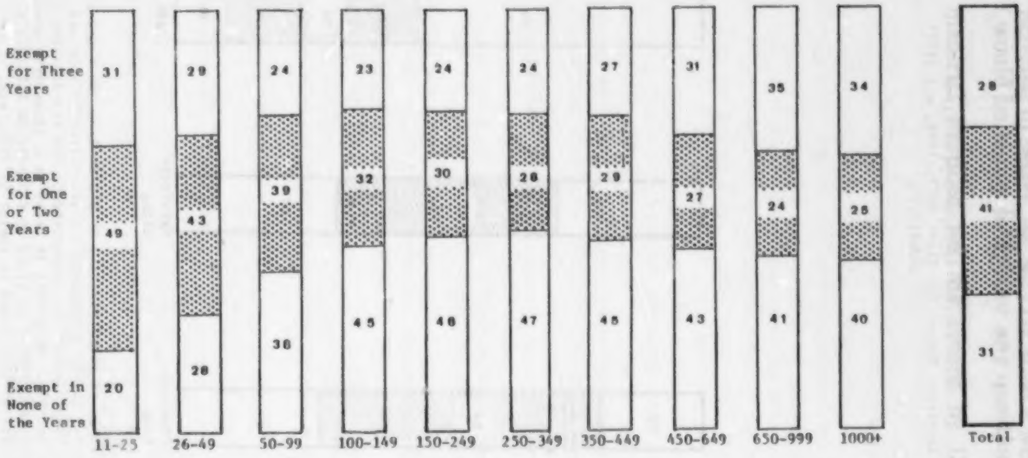
* Based on a sample of firms surveyed by BLS in 1975, 1976 and 1977. Figures are weighted for sampling frequency, which varies by size and industrial sector, then "benchmarked" to correspond to the distribution of U.S. private sector firms in 1977. Weighting is based on a three-year average of sample weights. Exemption status is based on criteria in S.2153. A firm qualifying for an exemption in 1975 would be exempt in 1976, etc.

Chart 2

Estimated Percent Distribution of Manufacturing Firms
By Exemption Status for Years 1975, 1976 and 1977*
(by firm size)



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* Based on a sample of firms surveyed in BLS in 1975, 1976 and 1977. Figures are weighted for sampling frequency, which varies by size and industrial sector, then "benchmarked" to correspond to the distribution of U.S. private sector firms in 1977. Weighting is based on a three-year average of sample weights. Exemption status is based on criteria in S.2153. A firm qualifying for an exemption in 1975 would be exempt in 1976, etc.

Table I: ABILITY OF STATES TO FURNISH INFORMATION UNDER S. 2153[1]

The following 32 States require employers covered by workers' compensation to report all occupational injuries which result in 2 or more lost workdays:

	Able to provide "complete candidates lists"without further ado	Needs Computerization	Needs to further identify employers	Does not cover all employees	Needs to remove confidentiality restrictions
Alaska				X	
Arizona	X				
California				X	
Connecticut		X	X	X	
Delaware			X	X	
Florida			X	X	
Hawaii				X	
Idaho				X	
Illinois		X	X	X	
Indiana			X	X	
Kansas			X	X	
Maine				X	
Massachusetts			X	X	
Missouri			X	X	
Montana	X				
Nebraska				X	
Nevada				X	
New Hampshire		X	X	X	
New Jersey			X	X	
New Mexico				X	
North Carolina				X	X
North Dakota				X	X
Oklahoma		X	X	X	X
Pennsylvania				X	
South Dakota				X	X
Texas			X	X	
Utah			X	X	
Vermont			X	X	
Virginia				X	
West Virginia				X	
Washington			X	X	
Wyoming				X	

1) Based on information available as of October 1979.

4/10/80

Table II

Features of Workers' Compensation Programs Needed to Provide Data for S. 2153

State	All Workers Covered 1/	Min. LWD for Reporting 2/	Employer Address or I.D. Number	Automated	Data Confidentiality Restrictions
Alabama		4			
Alaska		All	X	X	
Arizona	X	All	X	X	X
Arkansas		8	X	X	
California		All	X	X	
Colorado		3	X	X	
Connecticut		2			
Delaware		All		X	
District of Columbia					
Florida		All	X	X	
Georgia		8		X	
Hawaii		2	X	X	
Idaho		All	X	X	
Illinois		2			
Indiana		2		X	
Iowa		4	X	X	
Kansas		2		X	
Kentucky		8	X	X	
Louisiana		—			
Maine		All	X		
Maryland		4		X	
Massachusetts		All		X	
Michigan		8	X	X	

1/ Except for certain casual, domestic and other small groups of employees.

2/ LWD means Lost Work Days.

Table II (con't) pg. 2

Features of Workers' Compensation Programs Needed to Provide Data for S. 2153

State	All Workers Covered	Min. LWD for Reporting	Employer Address or I.D. Number	Automated	Data Confidentiality Restrictions
Minnesota		4		X	
Mississippi		6		X	
Missouri		All	X	X	
Montana	X	All	X	X	
Nebraska		All	X	X	
Nevada		All	X	X	
New Hampshire		All			
New Jersey		All		X	
New Mexico		All	X	X	
New York		8		X	X
North Carolina		2	X	X	X
North Dakota		All	X	X	X
Ohio		All	X	X	X
Oklahoma		All		1/	
Oregon		4	X	X	
Pennsylvania		All	X	X	
Rhode Island		4			
South Carolina		varies up to 7 days			
South Dakota		All	X	X	X
Tennessee		8	X	X	
Texas		All		X	
Utah		All	X	X	

1/ As of October 1979. However, Oklahoma is presently implementing an automated system.

Table II (con't) pg. 3

Features of Workers' Compensation Programs Needed to Provide Data for S. 2153

State	All Workers Covered	Min. LWD for Reporting	Employer Address or I.D. Number	Automated	Data Confidentiality Restrictions
Vermont		All		X	
Virginia		All	X	X	
West Virginia		All	X	X	
Washington		All	X	X	
Wisconsin		4	X	X	
Wyoming		All	X	X	

Table III

Coverage of Workers Under State Workers' Compensation Programs

State	All Workers Covered 1/	Compulsory Laws	Size Exemption	Compulsory Agricultural Coverage 3/
Alabama		X	2 or less	
Alaska		(X) 2/	0	
Arizona	X	(X)	0	X
Arkansas		(X)	2 or less	
California		X	0	X
Colorado		(X)	0	X
Connecticut		(X)	0	X
Delaware		X	0	
District of Columbia		X	0	X
Florida		(X)	2 or less	
Georgia		(X)	2 or less	
Hawaii		X	0	X
Idaho		X	0	
Illinois		Voluntary for non-hazardous employment	0, but 2 or less in transportation	
Indiana		X	0	
Iowa		(X)	0	
Kansas		(X)	less than $10,000/yr. gross payroll	
Kentucky		(X)	0	
Louisiana		(X)	0	X
Maine		(X)	0	
Maryland		(X)	0	
Massachusetts		X	0	X
Michigan		X	2 part-time	X

Table III (con't) pg. 2

Coverage of Workers Under State Workers' Compensation Programs

State	All Workers Covered	Compulsory Coverage	Size Exemption	Compulsory Agricultural Coverage
Minnesota		X	0	
Mississippi		X	4 or less	
Missouri		X	4 or less	
Montana	X	(X)	0	X
Nebraska		(X)	0	
Nevada		X	0	
New Hampshire		X	0	X
New Jersey			0	X
New Mexico		(X)	2 or less	
New York		X	0	
North Carolina		Voluntary for non-hazardous employment	3 or less; 9 or less in certain logging operations	
North Dakota		Voluntary for non-hazardous employment	0	
Ohio		(X)	0	X
Oklahoma		X	0	
Oregon		X	0	X
Pennsylvania		X	0	
Rhode Island		X	3 or less	
South Carolina			3 or less	
South Dakota		(X)	—	
Tennessee		(X)	4 or less	
Texas			0	
Utah		X	0	
Vermont		(X)	0	

Table III (con't) pg. 3

Coverage of Workers Under State Workers' Compensation Programs

State	All Workers Covered	Compulsory Coverage	Size Exemption	Compulsory Agricultural Coverage
Virginia		(X)	2 or less	
West Virginia		X	0	
Washington		X	0	
Wisconsin		X	2 or less	
Wyoming		X	0	

1/ Except for certain casual, domestic and other small groups of employees.

2/ Although these States have compulsory workers' compensation laws, waivers are permitted.

3/ For farmworkers covered on the same basis as all other employees.

The CHAIRMAN. What does that mean? If it is working all right, "don't fix it"? That is a Bert Lance quotation.

As I interpreted that, as I read your reference to King Lear, that is what you seem to be saying. If it is working all right, "Don't fix it."

Now, the question is, How well, basically, is OSHA working? We have had our oversight hearings, on the administration of safety and health program, and we came away with solid conclusions that the world of occupational safety and health has been greatly advanced by your administration of this effort, Doctor Bingham. We still feel that our attention should be directed at how it can be even more effectively done.

I think you would agree that any effort to maximize conditions for safety in our workplaces requires a community effort within that workplace, both management and labor. Central to your effort and to our thought is how do we draw forth the best effort of both sides of the workplace equation, management and labor.

Certainly the program of new directions, education consultation that is already in place, it would seem to me significantly advances the effort. It does not insure, of course, that we will see in all places a maximum of effort.

But, it seems to me that part of our inquiry, here, in this legislative forum must center on how we feel we can best draw forth that necessary best effort? Fundamental to your feeling as I understand it is that the managers of all workplaces should live under, can I say, an anxiety that they will be inspected. I think fundamental to Senator Schweiker's bill is the thought that if there can be another kind of incentive, not anxiety of inspection, but in a sense a favorable reward for creating the conditions of safety in the workplace. That issue seems to be central here, whether it is more effective that some have a sword over their head, or whether we will get better results if some can be relieved of the sword by creating the safe place. Then, of course, you come to the question of how do you determine whether it is a safe place.

I am sure there is difficulty in finding that. The Schweiker bill does this through the use, in part, of workers' compensation statistics. Whether they are adequate, that is another inquiry that is also before us, and it is an essential inquiry, also.

I will say that in this world of targeting though, you also rely on certain statistical data. The same data that comes to you second degree, goes in the first degree to the Bureau of Labor Statistics, am I right?

Dr. BINGHAM. That is correct.

The CHAIRMAN. And as described to me perhaps BLS statistics are a more reliable targeting basis in a sense than those data from a number of sources, including employer reports and State workers' compensation figures. There is a difference here, is there not?

Dr. BINGHAM. Yes.

The CHAIRMAN. I just wonder philosophically how you look at this whole proposition of how you draw forth the best effort. Is it best done through the anxiety of inspection, or is it better done through the reward for the proven safe place?

Dr. BINGHAM. Well, of course, that is almost a philosophical question. I think an effective occupational safety and health program in this country must consist of many facets, and I have tried to change the OSHA program in the last 3 years to demonstrate that.

It is important for employers to recognize hazards. It is very important for workers to understand the hazards and why they should wear a hard hat, why certain vapors are toxic, or a machine guard must be left on.

I think that labor-management committees offer great potential. They must be constituted in such a way though that both sides have a choice in the program. Certainly you will want to explore the demonstration project that is occurring now in California with Don Vial, when he is here, I believe, on Thursday, before this committee.

We do give credit for good faith effort in our penalty assessments if we happen to go into a facility where it is clear that the employer has made such efforts. I think you have to look at all the facets and how they interact with each other; they are all important to the whole, and really do not lend themselves to being separated out or eliminating various parts of them.

I tell you, I bet there are some people that would not file their income tax returns on time if they did not know that they would be fined, have a penalty assessed for the amount that they owe. They would let it slip for 3 or 4 days, or a week. That is not to say that you are not a law abiding person, but you file and get it in that mail so that it is stamped on time, so you will not have to pay the penalty.

I think, in our lives, money means something to us as individuals. We do respond to that. But that by no means is all that is involved in safety and health programs.

I would like to ask Mr. Whiting to comment a little on labor-management committees, and the opinions that some industries have about them, and whether or not they approve of them.

Mr. **Whiting**. Mr. Chairman, about 40 percent of American collective bargaining agreements at present have joint safety, or safety and health committees in place. Some of those have a long history, as I think the committee knows. But they are not always uniformly successful, and not always well regarded. The labor movement itself is not uniformly supportive of a major emphasis on labor-management committees as a part of this program, and business itself has expressed, on numerous occasions, that it is not uniformly interested in giving up what it sees as management prerogatives to a committee that would have some real teeth.

We think there are a number of labor-management pairs around the country that are willing to work together in a joint matter and set up a mechanism in the workplace to deal effectively with safety.

The way to proceed in this matter is not through statute, but through some focused experimentation or demonstration projects where we work with those labor-management pairs that are in position and are willing to try to devise these new and better instruments.

The **Chairman**. We will have to start working under a time limit here, I am afraid, gentlemen. There are two areas that I would like to explore with you, Doctor Bingham.

It seems to me that the Schweiker bill provides a fail-safe mechanism here for those areas that would be exempt from scheduled safety inspections under the provisions of the bill, and that is the worker complaint procedure. I gather you feel that the provisions of section 4 (a) and down to paragraph (b) are too limiting with respect to the administration's ability to respond to a worker complaint. I gather in your view, the limiting factor centers on the language which requires you to initially forego an inspection in response to a complaint unless it makes out an imminent danger or other hazard so serious in nature that it warrants the expeditious attention of the Secretary. I gather you feel that this constitutes a limitation on the part of the administration of OSHA to respond to workers' complaints?

Dr. **Bingham**. Yes. I would like to turn to Mr. Mintz, who has looked at this bill in detail, in terms of its legality and interpretation.

Mr. **Mintz**. Mr. Chairman, our concern relates to the right of OSHA to respond to complaints affecting exempt employers. Under the language of the bill OSHA could not conduct an immediate inspection even if it received a formal employee complaint in writing. Rather, the agency would have to notify the employer of the complaint, and only if the employer failed to provide satisfactory assurances could the agency conduct an onsite inspection.

We believe that that would rigidly prevent us from responding to these employee complaints.

Senator **Schweiker**. Do you not determine whether they are satisfactory? Under that section, you have the power to make that judgment, do you not? You make that judgment to your satisfaction.

Mr. Mintz. Senator, the section says that we can inspect if the employer has failed to provide satisfactory assurances.

Under our present policy regarding complaints we do inspect, respecting informal complaints, if satisfactory assurances have not been received.

In addition, we conduct random sampling to followup inspections, even where satisfactory assurances have been received.

So that we can satisfy ourselves that as a general matter they are responding truthfully, and as incentives these responses would continue to be received. Under the language of the bill we cannot see how we would have authority to conduct that random sample of followups, since by hypothesis that would not be a situation where we have failed to receive satisfactory assurance.

Senator Schweiker. Well, satisfy yourselves. That is exactly what the intent is. That is what the wording is. It is not the employer who needs to be satisfied; it is OSHA. That is exactly what the intent of that section is, to satisfy OSHA. You make that determination.

Mr. Mintz. Senator, the further concern is that if there is an ambiguity in this section, and at the very least we believe there would be in our attempt to follow up employers' assurances, and conduct an inspection, we could very likely be met with another interpretation by the employer, preventing inspection, and that would require us to get the warrant with all the concomitant complex litigation.

Each of these ambiguities does create a potential administrative and legal burden on the agency.

Senator Schweiker. Well, if that is all you are concerned about, we can certainly eliminate any ambiguity, because the intent is to give you the option of determining whether it is satisfactory. If it is just clearing up ambiguity, we can give you that. That is no problem, you know. You differ with my interpretation, and I differ with yours.

Mr. Mintz. Senator, there remains the basic problem regarding the handling of complaints, and we would have no right to respond to written employee complaints which appear to have merit, by immediate inspection, but rather we would have to go through the procedure of writing to the employer.

Senator Schweiker. You would have a right to go into anything that is not rectified. And if it is an urgent problem, you have the right to go in immediately under my bill. We also, in another section, give you a right to go into cases like dynamite factories, grain elevators, and other cases where statistics do not indicate occupational hazards.

Mr. Mintz. Senator, provision subsection (b) referred to imminent dangers and other hazards so serious in nature that warrant expeditious attention of the Secretary.

Our understanding of that language is that we are not talking about serious hazards, but something considerably greater than serious hazards.

Senator Schweiker. That warrants expeditious attention. It says anything that warrants expeditious attention of the Secretary. You make that determination as to the need for expeditious attention. You keep putting obstacles in the language when in fact it clearly says if it warrants expeditious attention of the Secretary, you have the right to go in immediately. You can say black is white and white is black all day.

Dr. **Bingham**. Could I give you an example of where we would be hard pressed if this limitation were put on us?

We get in writing sometimes a request from a worker to come out to a facility because the worker is hot. He is uncomfortable. Hot and uncomfortable. If we were stopped at the door, if we had problems, it would be very difficult to defend that. It would be very difficult for us to say that that needs expeditious attention. It turns out actually that we have a case that I think Mr. Clark can tell you about, where when we got out there, we found that indeed that worker was hot. It was a hot day, and you might say, "oh," well, but that worker is over a vat that is maybe 200 degrees Fahrenheit, and there are fumes coming out of that vat. The worker really is not equipped to deal with that in a sophisticated manner. That worker knows it is hot, and he feels uncomfortable. He does not perhaps know that there are hazardous fumes, and that is why he is uncomfortable.

Senator **Schweiker**. Suppose you had that complaint, how would you handle that under the new procedure? You had oral complaint under your new procedure, what would you do now?

Dr. **Bingham**. Let me ask Mr. Clark, since he is with Enforcement.

Senator **Schweiker**. If that was an oral complaint, what would you now do?

Mr. **Clark**. We would follow up with that employee in detail. We would contact other people there, who work there, to ascertain what is actually going on, and what they are being exposed to, hopefully trying to find out if employees themselves knew. Oftentimes they do not know what they are being exposed to.

Dr. **Bingham**. Would we go out?

Mr. **Clark**. If we found those kinds of conditions that Doctor Bingham described, we would go out.

Mr. **Whiting**. You make a judgment of the nature of the industry. If this is a complaint that seems a little vague, "I do not feel well," "hot in here," "feel dizzy," you look at the nature of the business, and if you are dealing with an industry that has a plating operation, you would go out on the basis of that industry. If it is not that kind of industry, yet a specific complaint in what seems like a low-hazard employer—well, we have discretion to make that decision based upon our knowledge of the situation and our experience.

The bill takes away that discretion, except in situations that are obviously egregious.

Senator **Schweiker**. Again, if you are not feeling well, if there are names, that is a health situation. I want to read my section of the bill again: "nothing in this subsection shall limit the authority and responsibility of the Secretary to take all actions authorized by this act with respect to occupational health hazards."

Dr. **Bingham**. How would you know, Senator?

Senator **Schweiker**. You just described it as fumes, and the employee felt faint. You can say black is white all day long. You can climb around the bill, but in fact there is authority.

Dr. **Bingham**. How could we make all those decisions beforehand, if we are restricted?

Senator **Schweiker**. The same way you do it now. The point is there is a health situation there. You just described it as a health case. You keep throwing up roadblocks, and you do not read the bill.

Mr. **Mintz**. May I suggest as follows, Senator? We have considered the language very carefully, including the language "so serious in nature that warrants expeditious attention by the Secretary."

Yes, it is correct that we would make initial determinations, and we could interpret that language in some manner favorable to safety inspections. However, our initial determination does not include the question whether we would be in a position to conduct the inspection, because where the language has different interpretations, we may well be prevented from conducting that inspection which will, as I indicated, trigger the warrant procedure.

We have had more than 1 year of experience under the *Barlow* decision.

Senator **Schweiker**. Of course, the warrant procedure has nothing to do with my bill. That was a court decision. Let us not throw that up against my bill.

Mr. **Mintz**. Of course, the Supreme Court decision in *Barlow* was based on the fourth amendment.

Senator **Schweiker**. Let us argue with the Supreme Court on that.

Mr. **Mintz**. However, we have to evaluate the statutory provisions in the context of existing constitutional law and court decisions. There is a right by the employer under that court decision to demand—to refuse to allow inspection, to require that the agency go to a Magistrate or district court to obtain a warrant before an inspection is conducted.

Our concern is, as the testimony by Dr. Bingham indicated, that distinct limitations on authority to inspect, both as to initial inspection, and in the scope of the inspection would create difficulty in terms of actually conducting the inspection, extremely likely leading to litigation.

Of course, the *Barlow* decision has nothing to do directly with this bill. It existed before. But it is the impact of this bill in relation to *Barlow* that is causing concern.

Senator **Schweiker**. No matter what revision we make, you would have the *Barlow* decision to deal with. You would have that as a roadblock if somebody wanted to throw it up. Let us not confuse the two issues. That is the problem the court laid down, and the point is you have to deal with that. You have to deal with it whether my bill is passed or not. That is the point.

Mr. **Mintz**. Under the present law there is no distinction between our conducting—there is no limitation on our authority to conduct safety inspections in circumstances which are so serious in nature as to warrant expeditious treatment. That is not a provision in our present law. If this bill were enacted, that would be a limitation on our authority, and therefore an issue both in warrant litigation and in commission proceedings. That is our concern.

Senator **Schweiker**. Sir, you also overlook the right to go in on health hazard at the drop of a hat, without any qualification whatsoever. You also overlook the opportunity to go in and resolve something that is not satisfactorily resolved. You have two other escape routes beside the one you keep talking about. You now follow that practice exactly with the oral complaint procedure. That is where we got this provision of the bill, from your present oral complaint procedure that GAO recommended.

We ought to at least have some kind of objectivity.

Mr. Chairman, I have a few questions that I would like to get around to asking now.

Mr. **Mintz**. With reference to recommendations of GAO, GAO recommended the notification to the employer in the context of nonserious complaints. With regard to serious complaints, they provided in their recommendation for some provisions for immediate inspection. GAO, in its recommendations, suggested that the agency go out inspecting on complaints, to look for other potentially serious hazards.

Senator **Schweiker**. What you are missing in your rebuttal is that you are overlooking in the bill that I introduced, I took the exact procedure that you folks are following on the oral complaints, and put it on written complaints. So I picked your procedure that you are picking all apart, and criticizing, you say handicaps you, and does this and that. I took your oral procedure and made it apply to written procedure.

Everything you say that you are condemning my bill on you can apply right now to the way you are handling the oral complaints. You do not seem to do that. You say my bill is wrong, even though I followed your particular procedure.

Dr. **Bingham**. We are doing this complaint policy that was recommended by GAO, on an experimental basis. I should tell you that philosophically I am not at all certain it is an appropriate thing to do. There are many workers out there that will call us and tell us verbally about their problems, who can neither read nor write, nor speak the language in this country. I find there is something not quite satisfactory in this administrative procedure, even though we are doing it on an experimental basis, and we will evaluate this after it has been in place for a period of time.

We are arguing against putting such a procedure in concrete for both written and oral complaints.

Senator **Schweiker**. The question I had is: the targeting is one of the obvious issues in this difference of opinion over which way to go.

Now, as you indicated, we have something like 4.3 million workplaces, Dr. Bingham, that we are overseeing in some way or another. We have 1,500 inspectors, including health and safety inspectors. Everybody works full time, and we can only inspect 2 percent of those places, including the health inspections.

If you throw in State programs, maybe 4 percent. But on routine safety inspections you can only inspect one-half of 1 percent of the workplaces. My question is why would we not target it to the areas of greatest need?

I would like to read you this report, President Carter's OSHA Task Force Report says:

OSHA also sends inspectors to many firms which are performing well compared to their industry average, and creates no incentive for individual firms to improve their rates. These trends could be reversed if OSHA increased frequency of its safety inspections in direct proportion to above average rate of serious injuries at particular establishments, while reducing frequency of inspections as better performing establishments approach industry average.

Now, that recommendation was in President Carter's task force, and Secretary of Labor Marshall was cochairman of this task force. You folks are up here arguing against the particular recommendation of the task force he chaired.

The very thing you say, Dr. Bingham, the very thing you say in your statement we should not be doing is exactly what President Carter's task force said we ought to be doing.

Dr. **Bingham**. I think you are right, I did say in my statement that is what we ought to be doing. That is what the task force recommended.

What we are saying in addition, though, is that those that are not targeted upon should not be exempted from the law. I would like to talk a little bit about targeting.

First of all, we are for it. We have been talking with NIOSH about how we can better target in the so-called safety area. We are very interested in the epidemiology of injuries. It was only a few weeks ago that one of our people went up and sat with Dr. Selikoff for one of the truly pioneering approaches to looking at the epidemiology of injuries.

NIOSH, as recently as 2 years ago—Dr. Robbins, is sitting behind me, and can correct me—came up with a group that will be investigating injuries, the fall protection hazards. We have had BLS collecting data on where, for example, eye injuries occur in SIC codes, where traumatic injuries to the head and face occur.

We will be using that information, along with NIOSH, to help come up with better targeting schemes.

Our fear is that you will set a rigid targeting scheme into place with exemptions that will prohibit us from doing actually the most modern and best job that we can really do with the Occupational Safety and Health Act. That is our concern.

Mr. **Whiting**. Our purpose is your purpose, Senator. I think we agree on the purpose of targeting in that area of your bill concerned with targeting. What we disagree with your bill on is that data are available under the scheme advanced, and that they should be used to support an exemption scheme.

If we had data that are proposed in the bill, we would use them very similarly to the way it was proposed. We would target very heavily on the worst firms, and not on firms that are having good experience rates. But those data are not available, and it is our judgment that that scheme is simply not workable.

In addition, we certainly would not use it as the basis of a formal exemption, because philosphically we feel this is wrong. But still clearly if we were to target more, we believe we should proceed through a series of demonstration projects. The task force report, which we agree with, recommended not a formal exemption, and not full use of a system based on yet unknown data, but that we try, through a variety of experimental demonstration projects, over a period of time, to devise data that would allow us to target tightly. We do not disagree with the purpose.

Senator Schweiker. The other question relates to the complaints procedure that we just briefly discussed.

As you know, and Dr. Bingham just commented on it, you are using the complaint procedure on verbal complaints now.

There are four reasons for applying the same procedure to oral and written complaints. First, the General Accounting Office recommended the same treatment for formal and nonformal complaints.

Second, President Carter's task force, with Secretary Marshall as cochairman, recommended the same thing. Third, your own data show no significant difference between a written and a verbal complaint in terms of the likelihood that a hazard will be found.

Fourth, we had understood from staff discussions prior to introduction of the bill that your only reason for the distinction was the legal wording of the formal complaint section of the act. So why do we not also do what the GAO and Carter's task force recommended? I keep coming back to the basic fact that we only have 1,500 inspectors for 4.3 million workplaces. Two out of every three inspections they make today misfire—two out of every three find no serious violations.

Now, we know that there are plenty of serious violations. We know that there are a lot of hazardous workplaces that are not being inspected. As long as two out of three inspections find no serious hazard, we are wasting two-thirds of our resources. We are not putting them where the action is. That is why I pressed in my bill and here to do the same thing in our written complaints that we do in verbal complaints.

I think the Philadelphia and Pittsburgh offices, the GAO report shows that almost all of their inspectors' time was devoted to complaints, and only a small percent found serious violations.

When two out of every three inspections misfire, it should be clear we are not putting inspections in the right places. Why not take the targeting one step further, and do it for written complaints?

Dr. Bingham. I would like to comment on this misfire, as you call it. I would put the figures in another context; 33⅓ percent of the time, one-third of the time, up until last year, uneducated, unsophisticated working men and women in this country were able to identify hazards in their workplace. I think that is pretty good, Senator.

Senator Schweiker. If you had the luxury of looking at every workplace, I would agree with you. But with 4 million workplaces, and 1,500 inspectors, I do not think it is good at all.

Dr. Bingham. We are doing something about that. We have educational programs, and I could give you data of a little informal study that I have done, that I have asked my staff to update, on certain labor unions that have had educational programs over a period of years. It turns out that something on the order of 75 percent of the complaints filed by the United Steelworkers, which has had an educational program for a long time turn up serious hazards, and somewhere around 75 to 80 percent of those complaints filed by the Oil, Chemical & Atomic Workers, turn up serious hazards.

What this says to me, as an administrator and policymaker, is that we should make our workers more sophisticated and able to understand more. It may turn out that workers are the best targeters of an unsafe workplace.

Senator **Schweiker**. I certainly concur that some unions do a much better job. I have no complaint about that. I know Steelworkers, for a long time, and the Oil, Chemical & Atomic Workers have put high emphasis on this. I do not disagree with that. But we have to look at the overall figure.

Dr. **Bingham**. I would like to educate all workers so they all perform. They should not have to belong to the Steelworkers or OCAW, to be able to do that. Let us educate unorganized workers in this country, and let us bring in education to those organized facilities that have not had educational programs on safety and health. I think it is possible to help all workers have that degree of accuracy when they file a complaint.

Mr. **Whiting**. I think there is a fundamental philosophical point here too. That is, a worker who has a fear about a workplace condition gets some response from his Government if he puts in a formal written complaint. We can turn around the numbers that you stated and say that one-third of our inspections result in serious violations, one-third result in nonserious violations, and the other third results in no violations, but reassurance to that employee that the situation he fears is indeed not as dangerous as he had thought. That is a positive result. That is Government responding to valid fear on the part of the employee.

We think the formal complaint mechanism is so important, when there is so much fear in the workplace, and so much distrust in the workplace, because the worker has a right, at least with that formal mechanism, to have us come out. We are willing to experiment on informal mechanisms. We do have concerns about using those resources effectively, and we have tried that for 6 months, and we want to see how that works for a year or so. We do not think we should tamper with the formal mechanism.

Senator **Schweiker**. I have one final question. I know our time is running on.

Doctor Bingham, you say on page 40 of your statement that my bill's definition of the workplace would permit gerrymandering of workplaces so some areas would be exempt and some would not.

This is one of the problems I have with the analysis that some of you folks make of my bill. Obviously you are not aware that the language in my bill was taken word for word from your regulation, specifically 1904.12(g)(1) on your regs, and specifically says: "Where distinctly separate activities are performed at a single physical location, each activity shall be treated as a separate establishment."

I took it right out of your regs. This is what I have had a battle with day in and day out. You folks say it means one thing, it is terrible. I picked it right out of your regs.

Dr. **Bingham**. I would like to ask Mr. Mintz to comment on the legal analysis.

Senator **Schweiker**. I would like to have somebody do it.

Mr. **Mintz**. Senator, the regulations that you are referring to are part 1904; those are recordkeeping regulations. The language is substantially the same as the language in the bill, in the definitional section.

Those regulations, however, relate to how records are going to be kept. They have nothing to do, of course, with questions of exemption or inspection authority.

Senator SCHWEIKER. Did you intend to gerrymander the country's workplaces by your recordkeeping definition? Was that your intent when you wrote those regs? Did you intend to gerrymander the workplaces by your own definitions?

Mr. MINTZ. Our concern, as we indicate in our testimony, is that there may be cases, we are concerned that there will be cases where the workplace unit, for purposes of exemption, will be arranged so as to broaden the exemption rather than to narrow it.

In light of the large numbers of paper, the affidavits that will be filed with the agency, it would be a very substantial burden on the agency to make the necessary investigations to determine whether or not there has been any abuse of the definition of workplace, and even if we did make that determination, of course there would be litigation to provide for before the review commission, and there would be yet more burdens prevailing——

Senator SCHWEIKER. You do not even like your own regs. Here you find fault with my bill. You picked at everything. When we get to something specific, it is nailed down that it is your reg. Now you give me 15 reasons it is no darn good. This is exactly why we have not had a cool, dispassionate rational dialog on this issue. If you are going to judge your own regs as lousy, of course the whole bill is lousy, and of course everything is wrong with it. That is what I tried to avoid by putting the bill in with bipartisan support. Obviously it has failed, and it fails when you pick your own reg apart. That is all.

Mr. MINTZ. It is one thing where the regulation is for one purpose, and another thing——

Senator SCHWEIKER. Was your purpose gerrymandering when you wrote those regs? Is that why you wrote those regs, to gerrymander workplaces? We do not believe that, and neither do you. That is why this fight has polarized.

Dr. BINGHAM. We do not think the consequences that you intended to occur was gerrymandering, and we just said that the way the language was written that it could occur when they talk about operations dispersed in different locations.

Now, for recordkeeping purposes, that would, I think, not have the same effect it would have in this bill.

Senator SCHWEIKER. I think I made my point, Mr. Chairman.

The CHAIRMAN. Senator Javits?

Senator JAVITS. I will pass for the moment.

The CHAIRMAN. We keep coming back to the issue of reliability of data, and the usefulness of various data for determining for targeting purposes where the hazards are. Evidently you have analyzed the use of State workers' compensation as contemplated in this bill, Doctor Bingham, and you find the State response to this proposal to be much too inadequate to give us a reliable data base upon which to determine where the workplace hazards are.

Two States, you say, might be considered reliable sources of information. Is that what your information is?

Dr. **Bingham**. I think it is one now.

The **Chairman**. What State is that?

Mr. **Whiting**. We have informal indication from one State that they would be willing to allow us to use workmen's compensation data for targeting somewhat along the lines envisaged by the bill. That is an informal indication. I am not sure it would be helpful to indicate the State at this juncture.

Another State had indicated that, and just recently said to us, well, maybe not.

The **Chairman**. How does BLS get enough reliable data to establish these injury incidence rates, by SIC's?

Mr. **Whiting**. Every employer of 10 or more under the law is required to keep a log. BLS samples those logs on a statistically drawn sample, drawn properly into various SIC codes, and that sample, which I think is the largest sample the Government runs in any of its sampling surveys, is the basis for BLS statistics. The employer submits that sample, or that log, to the State agency, which gathers the log and forward it on to us. That is sampling. It does not allow establishment data for all establishments in the country.

If we had all of those coming in, all four million, obviously we could make establishment rates of injury, but of course that would have to be checked.

The **Chairman**. Are those logs formally presented at the State level, the State departments of labor, or are they just kept within the company?

Dr. **Bingham**. They are kept within the company, and BLS collects the sample with a pledge of confidentiality, as they collect all their samples.

The **Chairman**. Using this approach in the Schweiker bill, would there be any way to adapt BLS required logkeeping to a more reliable data source for the purpose of finding of where hazards do exist?

Dr. **Bingham**. It would either be taking a sample of, let us say, by the Department, or perhaps trying to put out on a contract—taking all those records would be a phenomenal effort to do that for all those workplaces, one that certainly the Government would have trouble, I think, justifying every year. It seems like such a tremendous paperwork burden, and administratively such an enormous problem that it would be difficult to do that.

One of the things that I think is very important is that, and we touched upon it briefly, and perhaps you might ask Dr. Robbins in writing—although he is here—about NIOSH's work on trying to pinpoint dangerous operations.

You see, what we are talking about is establishment targeting. But what we really need is to be able to talk about, to pinpoint dangerous processes, dangerous establishments. We have done some of that in terms of trenching, for example. Trenching can lead to a number of deaths every year. We have made some attempts to do that, but it has not been a systematic attempt. I think we need research, by the agency that is supposed to help us out in this to come up with some better ways of targeting on dangerous processes and procedures in a factory.

The **Chairman**. Senator Hatch?

Senator HATCH. Dr. Bingham, I am concerned about this bill, also. I think Senator Schweiker has been somewhat unjustly accused. I would like to give a few examples of statements made by some of our union leaders in America.

Chief lobbyist of the AFL-CIO said Senator Schweiker's bill is potentially deadly for workers.

The United Electrical Workers publication says that the Schweiker bill would turn OSHA into a coroner's office.

The United Auto Workers publication says the Schweiker bill gives employers a license to maim and kill.

The Steelworkers Union has called upon its members to kill the Schweiker bill before it kills you.

Now, do you agree with these characterizations about the efforts made by the people here today?

Dr. BINGHAM. Well, I try to look at the bill more analytically.

Senator HATCH. I figured you would.

Dr. BINGHAM. And look at the problems that would occur. I think it would lead to some problems. I would not use those terms to describe them.

Senator HATCH. I did not think you would. You have listed some very interesting, and I think, provocative matters in your 46 page statement. I think you have gone to a lot of effort, and you have done a lot of detail work, and it has been very helpful to me.

But do you acknowledge any legislative need to change OSHA at this time, at all?

Dr. BINGHAM. No, sir.

Senator HATCH. You do not think there is any legislative need?

Dr. BINGHAM. No, sir.

Senator HATCH. I have had some workers call on me, and I have had, without exception, every business in my State and neighboring States complain about OSHA, even though some of them have not been investigated by OSHA.

Let me ask you this. In your judgment, does S. 2153 reflect any worthwhile concepts or ideas, or in your opinion is it totally lacking in redeeming social value, as some of its ardent opponents have suggested?

Dr. BINGHAM. Let me say this. I think the concepts and the ideas that Senator Schweiker and Senator Williams have set forth in the bill—I wish they had called me before this committee last year, and pounded the table and said, "why don't you try some of these experiments?"

Actually, we have been trying. We are indicating to you that we are trying some of these administrative changes to see whether or not they work.

And I tell you, if they had pounded the table, I would have worked on those specific ones a lot faster.

Senator HATCH. Maybe you will be working on them now that we have pounded the table.

Dr. BINGHAM. We certainly have done that in the case of consultation because we got such instructions, and we have it available now in all States. I think the motivations certainly are laudable, but I just think that we are still not at the point where we should put any of these into concrete, in a statute. We need to see what works.

You know, there are many issues, and I have tried to say this, that we have not yet dealt with, that Dr. Robbins can tell you about. We really do not have the research that will help us target on those facilities where workers are going to develop carpal tunnel syndrome, for example, and that could be lost if this piece of legislation is put into place.

Senator HATCH. I do not see how that is true.

Dr. BINGHAM. We are willing to look into the ideas. We have been looking into them.

Senator HATCH. Do you not agree that acceptable legislative changes would have the prospect of reducing the labor-management polarization which presently surrounds and engulfs OSHA's operations?

Dr. BINGHAM. I think that, to be honest with you, if this bill were to pass, labor-management relationships in the area of occupational safety and health would deteriorate from all that I hear.

Senator SCHWEIKER. How can they get any worse than they are now?

Dr. BINGHAM. I think they are improving. There are many workers now, and companies, who are providing education, and who are coming together for labor-management committees. I think that should be encouraged in an experimental way. But I do not think a company, for example, should feel compelled to have a labor-management committee when they are not organized, that is not their way of doing business, and companies have indicated to me that they object to this concept.

Senator HATCH. Paragraph G(1)(d) of the Schweiker bill does not allow credit for such valuable safety programs as are ongoing in the workplace today, even though numerous firms have excellent and longstanding safety programs and staffs.

Would you recommend that any employer safety personnel meeting prescribed competency requirements also be included in this paragraph to qualify for the prescribed exemptions?

Dr. BINGHAM. I do not agree with the exemption. I will tell you this, that in terms of assessing any penalties, if we do an inspection, we take into account good faith effort in attempts by the employer to clean up the workplace. If we see that they have on board, let us say, a safety engineer, industrial hygienist, who has worked out a plan to clean up the factory, if they have an abatement schedule laid out, that is taken into consideration as part of that employer's good faith effort.

Senator HATCH. Let us assume the bill passes, when I give you that question, that it passes, would you not recommend that employer safety personnel meeting prescribed competency requirement also be included in paragraph G(1)(d) to qualify for prescribed exemptions?

Let us assume amendment to the Labor-HEW appropriations bill exempted all small businesses with 10 or fewer employees who meet safety requirements.

Mr. WHITING. I believe this is the section on consultation on page 9.

Mr. MINTZ. Senator, as Dr. Bingham has indicated, under the law as it now stands, the agency is instructed to give, in processing penalties, to give regard for several factors, and one of these is good faith of the employer, in so doing we take into consideration any efforts that the employer has undertaken in order to promote occupational safety and health. This may be committees, or it may be consultants, outside consultants, inside consultants, a whole range of types of activities would qualify. This is a matter of judgment to the area director who proposes the penalty, subject, of course, to review of the adjudicatory body review commission.

Senator HATCH. Do you feel it would be a mistake to give you, that is, OSHA, the authority to establish competency requirements for safety professional, in light of the current State award certified safety professional certification of licensing?

Mr. WHITING. We think provisions of the bill that would put us in the business of certifying great numbers of consultants who come through the established safety engineering, industrial hygiene, and other relevant professions is really going to impose a tremendous burden on us. It is a terribly difficult task to make those kinds of judgments. It is grounds for contentiousness, and possible litigation. We do not think that is necessary.

We think that consultants now in the business can provide the services they do provide. We will provide services through State agencies to those employers who do not have access to private consultants, and we will take into account, in our existing penalty structure, efforts of employers to set up good safety and health practices. We do not think this is really necessary.

Dr. BINGHAM. The business of certification has been very difficult for the Federal Government. I think professional associations really should deal with this problem. You might want to discuss with Dr. Robbins the problems they have had, in terms of certifying personal protective equipment.

It is very difficult, and would involve a lot of paperwork, increase costs, both on the part of Government and on the part of the individuals who work for a particular company. I would say I would like not to get into that business.

Senator HATCH. I yield to my friend from New York for one question, and I just have one more.

Senator JAVITS. Mr. Chairman, I ask unanimous consent that this question and answer may appear at the appropriate place in the record.

The CHAIRMAN. Very well.

Senator JAVITS. I have to go to another hearing. You can answer this, or answer it later, if you cannot answer it now.

I am deeply interested in labor-management committees, especially as they relate to health and safety in the workplace.

I note with great interest, pointed out to me by Mr. Zimmerman, that there are certain inspection exemptions for Federal workplaces where there are labor-management committees. This appears in the Executive order published in the Federal Register on February 27.

Under this new Executive order covering Federal employees there is a provision promoting labor-management committees, and exempting those agencies which establish them from unannounced inspections. I also note that it provides authority to permit variances in consultation with labor-management committees.

Now, is there any possibility that something of what my colleagues are seeking to attain may be accomplished by extending the two concepts—labor-management committees and some ability to get elbow room in the standards, to the private sector through OSHA?

One other thing, if I may, we do have a law respecting labor-management committees, and their encouragement under the authority of the Mediation Service. That particular agency's jurisdiction might be changed. There is nothing inflexible about incorporating safety and health issues. Is there in this idea any basis for finding an accommodation?

You do not have to answer it immediately.

Dr. BINGHAM. I would like to make a couple of comments, and then expand the answer in writing, because I think we have a great deal of information.

We have looked at other countries' plans in this whole arena. I should point out to you that in the Federal sector we went from a system of not being allowed to inspect to one where we would go in, if we required the labor-management committee to be set up, and if they did not set one up, then we can go in.

So we went from nothing to something, rather than going in the other direction.

Now, this is an experiment. The Federal Government frequently acts as the experimental vehicle in some of its programs that will later be adopted by industry. We would be glad to expand the answer to the question that you have just posed to us for the record.

Senator JAVITS. And I wish you would cover also the extent to which you look toward this experiment to deal with your serious reservation, which I respect and take seriously, to the proposals made by Senator Schweiker.

All that I am saying is this: We have, in this committee especially, often reconciled the most irreconcilable views by finding some technique by which to do it. The question is may the labor-management technique, which can also be experimented with in the private sector, be that kind of a way out for these sharply conflicting views?

So, if you would address yourself to that in due course, and if it is interesting enough, I would ask the chairman to even have a hearing on that particular subject where we might consider the matter. I see it as a possibility.

Thank you very much.

Dr. BINGHAM. Yes, sir.

Senator JAVITS. Mr. Chairman, I ask unanimous consent that the answers to my questions, be put into the record as a reply.

The CHAIRMAN. It will be.

Senator HATCH. Dr. Bingham, I understand that anyone with a grain of intelligence should realize that the vast majority of businesses sincerely seek a safe and healthful work environment.

Would you agree with that statement?

Dr. BINGHAM. Absolutely.

Senator HATCH. Doesn't S. 2153 really represent a welcome cooperative partnership between the Government and employees and employers to improve workers' safety and health, and doesn't this make good economic sense?

Dr. BINGHAM. Well, I don't believe, as I have said, that the bill would have that effect. I think it would further polarize. I also believe that it would not save money, that it would cost more money and divert resources.

I am committed to a program that becomes more efficient over the next years, and I think this would divert resources.

Senator HATCH. As you know, there is a lot of animosity toward OSHA throughout the country by employers—and I might add by employees as well, it isn't just employers.

Dr. BINGHAM. Yes.

Senator HATCH. It's been a decade since OSHA was passed; it's cost business somewhere over $25 billion, and OSHA coupled with NIOSH has cost us about $1.5 billion over the past 10 years.

Now, a lot of people say there has been no significant impact on worker injury rates. In fact, since 1971, according to the statistics available to me, serious injuries have actually risen by 24 percent and the severity of those injuries have increased by about 33 percent.

Now, I realize statistics can be used in any way, but those are pretty tough statistics. And, on the other hand, National Safety Council statistics for the 8-year period prior to 1971 and the enactment of OSHA show a steady decline in fatalities and serious injuries. In fact, NSC statistics showed a trend of significant decrease in industry fatality and serious injury rates from World War II up to 1971.

Now, can you explain the apparent difficulty with those particular statistics?

Dr. BINGHAM. Well, I would like to just make a couple of comments—and perhaps Mr. Whiting would make one or two. And then if you would let us supplement that for the record.

Senator HATCH. I would be happy to, and I ask unanimous consent that your additional response be put in the record.

Dr. BINGHAM. First of all, I would point out to you I think that in the last few years we do see workers rightfully being able to take the time that is required to recover from an illness or an injury, and that time has increased somewhat. And that would tend to skew the statistics.

Also, in these statistics, the raw data, they do not take into account changes in the work force and cyclical events like new workers, who are always more apt to be involved in some of these accidents, because they have not had the training that has been given the experienced worker. Also, the statistics—it's very difficult to understand. We have made an honest attempt to tell the world about occupational safety and health, and maybe we get better reporting now than we did before I came.

Also, if I had my way, certain other kinds of injuries would be reported on the log that have not been reported before. For example, a worker, let's say, has a piece of metal hit him in the abdomen and it separates muscle. Now, that is usually not reported on a log of injury, but that worker, using his insurance, is able to go to the hospital and have that repaired. I would venture to say that that is never reported on the log as a workplace injury.

We are trying to encourage employers to report these types of activity. For example, carpel tunnel syndrome that is taken care of by surgery wouldn't be reported.

What I am saying is that we have, I have, attempted to create the climate where we have all these data. And I think that it may work against me. But even if it did I would still do those things, because I believe I have that responsibility.

Did you want to make a comment on it?

Mr. WHITING. Well, one can always talk about statistics—the glass is half full or half empty, depending on where you sit. The hearings in this committee that led to the passage of the act in 1970 showed a 29-percent increase in accidents between 1960 and 1969—and that is different from the data from the National Safety Council.

So you have to look at statistics very, very closely, and we have argued in this room in the last month about the data, the last time the Secretary was here, as to whether you look at lost workday or lost workday case rates or whether you look at the basic injury rates. We focus on the injury rates because that is closest to the event we are concerned about, which is the occurrence of an injury. Lost workday data measures something beyond that, because they measure the ability of people to use the system's insurance to stay at home. Now, that may or may not add additional increments to the actual injury rates if people over time use insurance and stay at home more. Such statistics do not necessarily reflect the injury itself. So it's a very complicated situation. When you look at disaggregated data by industry sector—on construction, on manufacturing, and subcategories where we have been able to concentrate our resources over the years, you see declines in the injury rates of 20 percent. And that's a fairly significant drop.

We are not sure we can attribute that directly to OSHA—there has been a lot going on in the economy as well—but that is different than the other statistics which show increases and measure more than just the occurrence of injuries.

Senator HATCH. If I could just say one other thing—and my time is clearly up—if I haven't interpreted incorrectly, it seems to me that you have come to this committee and said there should be no changes in the present OSHA system. Now, I can remember last year on the Senate floor during the Labor-HEW appropriations bill, the Church amendment came up which would have completely exempted all businesses with 10 or fewer employees. And there were basically three people on the floor who—three or four—who got together—Senator Schweiker, Senator Williams, and myself—because we realized that workers do deserve consideration in this area throughout our society and that there must be a climate where we encourage employers to do all that they can to have safe workplaces.

So what we did—much to the animosity of a number of people on the floor who politically wanted to vote for the other—and it would have passed on the Senate floor that day—now, whether it would have held in conference or not is a matter of debate—I don't think it would have, but I think it's just a matter of time until it would happen, because there is so much complaint against OSHA out there in the country. So basically the three of us got together and we decided to substitute—it was Senator Schweiker who led that—decided to substitute the Schweiker amendment to the Church amendment—and I think by 68 votes or so we won. Now, had we not done that, the Church amendment would have passed, in my opinion, which would have been a complete knockout of OSHA.

Now, our approach was that we should knock OSHA out with regard to those industries that have good safety records. Now, how you define good safety records—I would rather have you come in here and say, well, your definition isn't good enough, and we would like to see you do this, than come in and just stonewall—that may not be the word, but at least take the totally antagonistic approach toward the bill.

And what I am trying to say is that there is so much antagonism to OSHA, and justifiable antagonism to OSHA, across the country, that some of us realize that it is time to put the incentives the other way. Instead of strict Government regulation, we ought to give the incentives to the business people and employees to try to avoid accidents in business and the workplace. And how you do that is the purpose of this bill and the purpose of these hearings.

We want to modify this bill if we can make it better. But, on the other hand, there is going to be an OSHA bill, whether it's this year or next year or 3 or 4 years from now. And it would be very beneficial to us if you would give us some help in those areas rather than take the position you can't change OSHA anyway, because OSHA wants to strictly regulate the rest of our lives. People aren't going to put up with it, as far as I am concerned.

Dr. BINGHAM. Thank you, Senator, I appreciate your comments and I appreciate your coming to this hearing. And I think that——

Senator HATCH. If I could just interrupt, I took an awful lot of flack as a conservative, because I didn't vote for the Church amendment. And I still take that flack. But I think that I did what was right in trying to have some sort of incentive effect to get businesses to try and solve these problems and to get OSHA to be able to go into those areas where OSHA is truly needed perhaps; but not to continually walk in and issue fines and citations in fundamentally safe places where OSHA is not really needed.

Dr. BINGHAM. Well, I agree that we need to perhaps change some emphases and focuses and do a better job of targeting, and I appreciate your comments. And I think these hearings are certainly beneficial. It brings out for everyone to see what are the problems with the data systems and how they could be improved. It's not antagonism to the bill; it's just that I do not see that that is the way to achieve what I think you would like to achieve.

Senator HATCH. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. I have questions that I would like to submit in writing for a written response, if I might, Dr. Bingham.

It seems to me that so much of the major bill before us does codify in statutory form what you are doing administratively; in targeting, in the complaint procedure, even in this area of the definition of the workplace. I can certainly see some problems in this approach to targeting, for example, with respect to reliability of data.

But this bill moves in the direction of codification of those things, that you have done administratively, that we obviously applaud.

The refinements before us are many. But I don't believe the effort is worthy of a lot of the explosive descriptions that have been applied across the country. That's the way it impresses me. And some of them have been described here, but not this morning from that table.

We appreciate that. So with written questions for written response, we will thank you all again.

Dr. BINGHAM. Thank you, Mr. Chairman.

[The information referred to follows:]

Labor-Management Safety and Health Committees

The San Onofre Voluntary Compliance Agreement Program (where Bechtel is constructing a nuclear facility) is the only program involving an agreement with a regulatory authority to reduce occupational safety and health inspections because of the activities of a labor/managment safety committee. However, approximately 43 percent of all collective bargaining agreements in this country provide for some sort of joint safety committee. These committees have varying degrees of activity and success. OSHA is currently collecting information on such committees here, in Canada and in Europe.

OSHA has attempted to negotiate other demonstration projects involving successful labor/management committees. We are negotiating with one firm and its union at this time. However, the information necessary for evaluating experimental or demonstration projects of this nature is not often readily available for reasons of confidentiality or inconvenience.

OSHA plans to evaluate the new emphasis on labor/management safety committees in the Federal Sector and to develop an experimental program (to run concurrently with further, more in-depth research on existing committees) to be built on the results of our present data collection and consultation with business and labor leaders.

OSHA, then, is proceeding towards an experimental program for labor-management safety committees from a base of solid understanding. The agency has commissioned several legal analyses of possible problems such as: conflict or overlap with other laws and agencies' jurisdictions, questions of confidentiality of information and extent of liability for labor representatives on committees assumming any regulatory role. These studies should be completed in June.

OSHA will also be conferring with businesses and labor leaders to elicit their ideas about the uses of labor-management safety committees, what makes then effective and how such committees may be used by OSHA in an experimental program.

OSHA has learned from the existing San Onofre experimental program for self-inspections by labor-management committees that an employer can reduce the number of complaints referred to the occupational safety and health regulatory agency through the use of a good internal complaint-response system, overseen by a labor-management safety committee with power to achieve abatement of hazards. A reduction in complaint-referrals will automatically reduce the number of complaint inspections. This mechanism for complaints could be utilized by employers without special agreements or arrangements with the regulatory authority.

At the other end of the range of possible experimental programs involving such committees would be an attempt to reduce hazards at a workplace with an average or worse-than-average safety record by giving a strong labor-management committee a leading role in the safety program. Under such a program, committee members would be given training by OSHA in hazard recognition and other technical areas to enable them to oversee the workplace safety program. In this case the regulatory agency would act more as a resource to the committee than as an enforcement arm. Between these two degrees of authority delegated to the committees lies a range of other possibilities still to be explored.

Even though much preliminary work remains to be done before OSHA can decide on the optimum use of labor-management committees in workplace safety and health, the agency knows at this point that such committees will not answer all of the perceived problems that it faces. There is considerable doubt in OSHA about the appropriateness of labor-management committees in the unorganized workplace where no union strength exists to counterbalance the power of the employer. Nor are joint committees likely to be very practical for smaller employers because of the cost to them of time consumed in committee activities.

Since OSHA is not bound by legislation to any one approach in attempting to reduce the strain on its limited resources, alternative proposals may be considered for those establishments where labor-management committees would appear not likely to be helpful. For example, the agency is considering an experimental program involving combined trade association-union assistance to small employers in relatively low hazard industries. This concept is in very early stages of discussion and may prove unfruitful, but OSHA will continue to explore this and other ideas that could be benefical to employers and employees.

Occupational Injury-Illness Statistics

The 24% and 33% increases referred to by Senator Hatch represent lost workday case rates and total lost workdays resulting from occupational injuries and illnesses. These figures do not relate to the incidence of workplace injuries and illnesses which have actually decreased by 14% over the past decade. Each year, the Bureau of Labor Statistics conducts a survey of the extent of injuries and illnesses in the U.S. From this survey, the Bureau publishes several indices. One of these indices, Lost Workday Injuries, has increased by about 25%, from 3.3 lost workday injuries per 100 workers in 1972, to 4.1 lost workday injuries per 100 workers in 1978. Another index - total lost workdays has increased from 47.9 per 100 workers in 1972 to 63.5 per 100 workers in 1978, an increase of approximately 33%.

However, the same BLS survey also generates another index, called Total Injuries and Illnesses. This measure records all injuries requiring medical treatment, even if the injury does not involve days away from work. According to this measure, total injuries in American workplaces have been reduced from 10.9 injuries and illnesses per 100 workers in 1972 to 9.4 injuries and illnesses per 100 workers in 1978. This is a decrease of about 14 percent.

As we've pointed out during the course of these hearings, a number of factors contribute to this apparent contradiction between injury and lost workday data. For instance, the 1970's saw a substantial liberalization in workers' compensation benefits. Among the most important changes were those that increased the proportion of wages to be replaced by workers' compensation benefits, thus raising the maximum weekly benefit amounts available to disabled workers. These changes had immediate and widespread effects on the adequacy of benefit payments. For example, in 1970, as many as 23 States had workers' compensation rates which replaced less than two-thirds of workers' regular salaries. Recently the picture changed. By 1978, a total of 47 States had adopted wage replacement rates at or above the two-thirds level. Moreover, from 1973 to 1977, maximum weekly benefits for temporary disability rose an average of 84 percent. In addition, some States have recently increased benefit levels for permanently disabled workers, and several have reduced the period of time a worker most be injured before he or she can receive retroactive benefits to cover the waiting period.

While State workers' compensation laws have become increasingly equitable, the liberalization of benefits has also permitted disabled workers to remain off the job for longer periods than would have been possible in previous years.

The increasing concern over medical liability is also a factor which has impacted lost workday rates. Given the rising occurrence of malpractice suits, physicians have become more and more cautious about encouraging workers to return to the job before they are physically able.

These combined factors explain, at least in part, the dichotomy of decreasing occupational injuries and increasing lost workday rates during the past decade.

OSHA LETTERS OF COMPLAINT BY EMPLOYERS AGAINST FEDERAL OSHA

In response to the request from Senator Nelson, OSHA staff reviewed letters of complaint regarding the OSHA program. 1,198 letters from OSHA files have been reviewed. These letters include all those received at OSHA headquarters. Additionally, all field office were requested to submit their letters of complaint from employers. These complaints cover the three year period from March 1977 to March 1980. The beginning of this period coincides with OSHA's redirection of its programs to common sense priorities. Complaints about the OSHA program from employers dropped 56% in this three year period.

1. Complaints Regarding Penalty Amounts and OSHA Inspection and Citation Procedures

A number of these complaints concerned the OSHA procedures regarding inspections and citations. For example:

- objections to OSHA's imposing penalties after the inspection without first allowing the employer to come into compliance;
- objections to OSHA inspections in response to annonymous complaints (employers objected to the potential for harassment);
- inability to comply with OSHA regulations, because of cost of compliance.

Other letters in this category expressed the need for more flexibility in OSHA regulations to allow for alternative approaches to hazard abatement. In many cases, the employer did not concur with OSHA's determination that a hazard existed or that the hazard was of the severity alleged by OSHA.

This category represents 44% of the total complaints reviewed. The number of complaints in this category decreased 43% in the three year period.

2. Occupational Safety and Health Standards

The complaints included criticism of existing OSHA standards, the need for clarification about standards, or criticism concerning the application of OSHA standards to the employer's particular operation.

This category represents 21% of the total of all employer complaints reviewed. The number of these complaints decreased 77% during the three year period.

3. General Complaints About OSHA

These complaints did not concern a negative experience with a particular OSHA inspection, but reflected a negative view of the agency in general. Some of the statements frequently made include:

- OSHA entry into a private workplace is unconstitutional.
- OSHA has not been effective in reducing serious injury rates and serious injury severity.
- OSHA is a costly bureaucracy and is a prime example of over-regulation.

This category represents 11% of all employer complaints reviewed. The number of these complaints decreased 69% during the three year period.

4. Complaints Regarding the Problem of Small Businesses and OSHA

In these letters small businesses complained that OSHA regulations impose an onerous regulatory burden. Frequently cited as examples of this burden were: cost of compliance with regulations; OSHA recordkeeping; time expended in achieving compliance with OSHA regulations; and non-applicability of standards to the small business operation.

This category represents 10% of all employer complaints reviewed. The number of these complaints decreased 80% during the three year period.

5. Complaints Regarding Incompetence of OSHA Inspectors

The most frequent employer complaint about the OSHA inspectors was their lack of specific training in particular operations and processes and their unfamiliarity with the particular type of operation which was to be inspected. Other complaints concerned compliance officer rudeness.

This category represents 5% of all the employer complaints reviewed. The number of these complaints declined 29% during the three year period.

6. Nitpicking

Complaints about OSHA nitpicking have diminished by 72%. However, OSHA heard from employers who were upset by a particular citation for what they considered to be a trivial matter, such as the absence of an exhaust fan or temporarily blocked exit doors.

This category represents 4% of all the employer complaints reviewed. The number of these complaints decreased 72% during the three year period.

7. Complaints About OSHA Informational Materials and Recordkeeping Forms

Complaints in this category concerned OSHA's general public information policies. This category includes a very wide range of topics, including the employers' concern about duplicate mailings and perceived inaccuracies of informational materials and programs.

This category represents 3% of all the employer complaints reviewed. The number of complaints in this category has increased 144%.

8. Misunderstanding of OSHA Regulations

This small category of complaints concerns misinformation about the nature of OSHA regulations. In certain instances the employer or employee had been misinformed, from a non-OSHA source, about the requirements of OSHA, such as an alleged OSHA ban on electric shavers in hospitals.

This category represents 2% of all the employer complaints reviewed. The number of complaints in this category decreased 73% during the three year period.

EMPLOYER COMPLAINT TALLY

	3/77- 2/78	3/78- 2/79	3/79 2/80	Total	% of Total	% Change
Penalties, Inspection and Citation Procedures, Ability to Comply	243	142	145	530	44%	-40%
OSHA Standards	161	49	37	247	21%	-77%
General Complaints About OSHA	68	32	27	127	11%	-60%
Small Businesses	83	23	17	123	10%	-80%
Incompetence of OSHA Inspectors	21	22	16	59	5%	-24%
Nitpicking	26	14	7	47	4%	-73%
OSHA Informational Materials, Programs and Recordkeeping Forms	9	8	22	39	3%	+144%
Misunderstanding About OSHA Regulations	15	6	5	24	2%	-67%
Total	626	296	276	1198	100%	-56%

Employee Complaints Against Federal OSHA

The number of employee complaints against Federal OSHA has also declined during the three year period. These complaints have decreased 16%.

EMPLOYEE COMPLAINTS

	3/77-2/78	3/78-2/79	3/79-2/80	Total	% of Total	% of Change
11(c) Discrimination (Employees are protected from employer reprisals for excercising their rights under the OSH Act.)	17	5	15	37	13%	-12%
Complaints About OSHA Inspections	93	84	77	255	87%	-17%
Totals	110	89	92	292	100%	-16%

FEDERAL AND STATE COMPLAINTS

	3/77- 2/78	3/78- 2/79	3/79- 2/80	Total	% of Total	% Change
Employer Complaints	626	296	276	1198	57%	-56%
Employee Complaints	110	89	92	291	14%	-16%
Complaints Against State Program Administration	198	188	234	620	29%	+18%
Totals	934	573	603	2109	100%	-35%

Overall, complaints against OSHA have decreased 35% in the past three years. The employer complaints against OSHA declined 56% overall. Employee complaints against OSHA declined 16%. Complaints against state program administration (CASPAs) increased 18%. The CASPAs were primarily from employees.

U.S. Department of Labor

Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

JUL 9 1980

Honorable Alan Cranston
United States Senate
Washington, D.C. 20510

Dear Senator Cranston:

I appreciate your taking time to meet with me in April to discuss targeting of OSHA inspections. Attached are responses to the three questions you submitted to me after the meeting.

As we discussed, effective targeting is vital both for maximizing worker protection and achieving public respect for the Agency. The complexities of the responses to your questions illustrate the wide range of approaches available to the agency; because of these complexities, administrative flexibility is preferable to a statutory targeting system. I am firmly committed to exploring and evaluating as many options as possible so that the agency will have a good basis for determining what the best targeting strategy is. We will keep you and your staff fully informed of the agency's efforts as we proceed.

Thank you again for your time and support. Please feel free to contact me if you need any further assistance.

Sincerely,

Eula Bingham

Eula Bingham
Assistant Secretary
Occupational Safety and Health

QUESTION #1 of Senator Cranston:

> Apart from the targeting system used by the federal OSHA program, and the workers compensation data used in demonstration programs such as California, are there other types of data available upon which a more precise targeted approach could be based?

DATA SOURCES FOR ESTABLISHMENT-TARGETING

RESPONSE: There are two major potential sources of data which reflect the injury experience of industries covered by the OSH Act. The first is the annual Bureau of Labor Statistics (BLS) survey which produces occupational injury/illness and lost workday case rates for industry groupings in the private sector. BLS statistics are compiled from data collected annually through the use of survey forms sent to a sampling of 280,000 employers. The results reflect the experience of approximately 4.5 million employers covered by the Act.

Because the BLS survey results are collected on a national basis and represent the experience of all industries under OSHA's jurisdiction (as well as industries that are not, e.g. - mining and railroads), these data are currently used as the basis for the agency's high hazard targeting system for safety inspections. However, because of confidentiality requirements maintained by BLS and the fact that only a limited number of employers participate in the survey, this source of data cannot currently provide the detailed information necessary to permit establishment-based targeting of inspections.

Another source of data which exists in individual workplaces is the OSHA Log. The Act requires all employers to keep records of work-related injuries, illnesses and fatalities; (establishments with 10 or fewer employees, however, do not have to keep the Log). These records are available to company employees and are routinely checked by OSHA compliance officers at the beginning of each safety and health inspection to determine which areas of operations in the company are high risk and should therefore be given special attention during an inspection. Presently, the Log forms are utilized strictly as an information vehicle at individual workplaces. They are not collected nationally for analytical purposes. (In the past, and starting again in 1980, a summary of the previous year's Log data is recorded along with the results of OSHA inspections by OSHA's Management Information System.)

One possible solution to the targeting data problem would involve transferring the annual occupational safety and health survey from BLS to OSHA. Data collected by OSHA would not be subject to confidentiality restrictions. Were OSHA to assume responsibility for this effort, procedures could be changed to require all employers with over a certain number of employees to submit copies of their logs annually to OSHA. For example, if all covered U.S. establishments employing more than 50 workers were to submit this data, 175,000 records for all firms in this size group would require special processing for targeting purposes. Using standard BLS sampling techniques, an additional 100,000 small employers in high-risk industries could also be selected and requested to submit log data. The resulting total of approximately 300,000 log forms would represent a manageable volume for purposes of processing and analysis.

Under this system, larger establishments (for example, those over 50) could be subject to establishment-targeting while smaller establishments would be scheduled for inspections based on industry rates, as OSHA presently does for all firms. Furthermore, the data could also be used to estimate injury rates, as BLS currently does.

While the creation of such a program would have advantages, it would constitute a marked increase in OSHA's workload and would require the agency to address the issue of data validity. The transfer of the survey from BLS to OSHA would represent a significant change in responsibility and functions for both organizations. Because of paperwork and cost factors, the reliability of information recorded on the OSHA log form has never been uniformly tested. Since these and other factors need to be carefully examined before reaching a decision on this matter, the agency has begun an extensive analysis of the feasibility and implications of data collection program along the lines noted above.

In addition to the two major data sources described, BLS in 1978, began to collect hazard-specific and injury-specific data. Eight surveys thus far (in 1978 on accidents involving ladders, scaffolds, power saws and welding, with emphasis on information about use of personal protective equipment; and in 1979 on injuries from impact to the foot, head, face and eye) could provide data for targeting of inspections to hazardous operations or processes.

Response to Question #2 of Senator Alan Cranston:

QUESTION: Do the insurance companies which provide workers compensation coverage to industry maintain any kind of information that could be useful in targeting inspections, and, if so, could it be released without violating confidentiality protections?

RESPONSE: Because OSHA and workers' compensation insurance carriers share a need for common data, we have investigated the possibility of establishing a data sharing program. However, in making inquiries of industry representatives, we have found that the information available would have little practical value as a basis for targeting inspections.

Some of the drawbacks of insurance industry data include:

- There exists no national repository for industry data appropriate for inspection targeting. The National Council on Compensation Insurance (NCCI) is the only organization which systematically collects workers' compensation data on the national level. However, this information is compiled for the purpose of establishing the manual rates for each labor class for each State. A review of this data revealed that it is generally one to three years old and contains only premium and loss dollar-amounts.
- Private insurance carriers handle only a portion of all workers' compensation claims filed nationwide. The remainder are received and paid by self-insured employers and State insurance offices.
- Claims data identifying occupational hazards are generally compiled on an occupational/industry basis. Little if any establishment-based information is available.
- There is a lack of uniformity among companies in the manner in which workers' compensation statistics are compiled.
- Even if establishment-based injury/illness data existed in the industry, both individual carriers and industry associations would face conflict-of-interest problems with their customers were they to agree to provide OSHA with such data broken out by individual company.

As these factors illustrate, insurance industry data is not appropriate or useful as a basis for inspection targeting. However, the agency feels there are other potentially valuable uses for this type of information. For instance, in another effort to use private insurance companies' records, OSHA has obtained Blue Cross/Blue Shield data for the State of Indiana. This information is being analyzed to assess the potential for defining occupational illnesses among workers in specific industries. The results of this kind of study will be extremely useful in identifying the need for new safety and health standards and for revising existing standards.

QUESTION #3 of Senator Alan Cranston:

> Can you initiate further demonstrations using other kinds of data in different states along the lines I have suggested to Dr. Bingham?

RESPONSE: The following is a summary of targeting models now being used in thirteen States that administer their own federally approved occupational safety and health programs:

1. Arizona

   A rate is constructed for each workplace based upon the last twelve months of claims reported to the Worker's Compensation program. The printout also lists the most recent inspection date and the type of inspection. Following an inspection, a firm goes off the list for 90 days and will not be reinspected except for complaints and accident investigations. The use of numbers of injuries guarantees that industry hazards and firm size rather than the employer's relative safety performance largely determine the priorities. In theory, very bad firms could be inspected up to four times a year.

2. California

   Using injury rates as a data base, California constructs an injury rate for each establishment by dividing the injury rate by the employment figures for each establishment. Employment data comes from the State unemployment insurance employment figures.

   Three-digit SIC industries are ranked according to a "Preventable Injury Rate." This rate is based upon measures of how likely different types of accidents are to involve violations of standards. This rate has a strong correlation with the overall industry rates. For each county, each district office receives a list which starts with the industry with the highest preventable injury rate. Within that industry, establishments in the county are listed according to their overall lost workday rates. Since the inspectors proceed down the list, a very bad establishment in a medium rate industry will be inspected after an average establishment in a high rate industry. Because of the industry focus and the high correlation between the "Preventabl Injury Rate" and the overall rates, the inspection priorities of this program probably do not differ greatly from those under OSHA's high hazard system.

3. Hawaii

   For each district within the state, separate computer printouts are prepared each month for manufacturing, construction, and agriculture/ fisheries. Reports cover all the injuries and illnesses reported to the Worker's Compensation system during the previous twelve months.

Hawaii (continued)

This ranking provides an aid to judgement rather than a substitute for it. The compliance supervisor in Honolulu uses discretion in choosing firms to be inspected. Injuries, illnesses and fatalities are each listed separately along with the employment figures and the date of the last inspection. Two rates are calculated on the printouts. Employers are listed in order by the total "unadjusted" injury rate--the total number of injuries and illnesses divided by the number of workers. Another "adjusted" rate is computed to consider severity. Injuries and illnesses get a weight of "1" if the severity is unknown; "2" for non-lost workday cases; "4" for lost workday cases and "8" for fatalities.

4. Michigan

Michigan uses a diverse set of criteria to set safety inspection priorities. The criteria used to schedule inspections vary among different industries. In manufacturing, a priority goes to all establishments that were not inspected during the previous year and which have more than ten employees. Workplaces are inspected if: 1) they had over 50 employees and an injury rate of more than 4% based upon workers' compensation data, 2) they had less than 50 employees and three or more such injuries or 3) a power press injury occurred or a violation related to a power press was cited.

5. Nevada

The Nevada Division of Occupational Safety and Health uses State workers' compensation data to identify the 400 establishments whose injury frequency rates increased most during the preceding year. In addition, Nevada's DOSH supplements this "400 list" by inspecting firms which perform very poorly within their industry groupings even though they may not be on the "400 list".

6. Oregon

Scheduled inspections in Oregon are assigned to one of three categories. This highest priority is workplaces where workers suffered a lost workday injury based upon workers' compensation data during the preceeding six months. The second priority goes to industries which have total recordable injury rates higher than the Oregon average for all industry. The third priority provides that if all firms inspected under the first and second priorities are found not to be in compliance, another inspection will be tentatively scheduled if the firm is in an industry whose recordable injury rate is above average.

7. Washington

The centerpiece of Washington's scheduling is a monthly system for redetermining priorities. Priorities are a function of three factors:

1.) The number of compensable (4 or more lost workdays) cases occurring at the establishment during the previous month;

2.) the experience modification rating of the firm, which reflects injury losses reported to the State workers compensation system during the previous 3 years;

3.) whether the establishment is in a target industry.

By the 15th of each month, a printout recounts the injuries reported during the previous month. Establishments with two or more injuries in a month will definitely be inspected the following month.

8. Utah

In Utah, statistical clerks review the worker's compensation "first reports of injury" daily. These are reviewed to determine whether there is a pattern of injuries and illnesses within an establishment or whether there have been any unreported injuries or illnesses. These situations are flagged and may trigger an inspection. The coders develop a priority list of "high hazard" establishment groupings based upon the frequency of certain types of accidents and their severity. Those establishment groups which show the greatest likelihood of disabling injuries head the list. Currently, the Utah list is headed by the construction and oil-well-drilling firms. Firms in the most hazardous group will be targeted for inspection annually. For less hazardous industry groups, firms may also be targeted for inspection annually, based upon where they fall within that hazardous group. Further down the list firms will be targeted for biannual inspection and so on down the list. Further, it is the State's policy that all establishments employing 500 or more workers will have some portion of their operation inspected annually.

9. Maryland

Maryland utilizes BLS survey results to shcedule safety inspection priorities on a high hazard basis. The basis of employer selection depends upon injury and illness incidence rates and a 50:35:15 ratio; that is, 50% of the inspection scheduling for small employers (1-19 employees), 35% for medium employment (20-99 employees), and 15% for 100 or more employees. Scheduling for health inspections is

9. Maryland (continued)

done on a monthly basis, based upon the computerized list of Maryland employers provided by the Maryland Employment Security Administration. Scheduling consists of two main parts: target industry programming and general schedule inspections. The target industry program includes six main areas of concentration: Chemical and Allied products, Petroleum and Coal products, Rubber and Plastic products, Primary Metal industries and certain glass, clay, and miscellaneous mineral products. General scheduling and target inspections are roughly equal in terms of frequency and are both based upon the same 50:35:15 ratio as discussed above.

10. Minnesota

Minnesota schedules inspections in the 249 industries (SIC's) with the highest number of workers' compensation claims during the past year. The State is considering modifying the system to target establishments with the highest number of such claims. Minnesota also has a grain elevator special emphasis program. The State has had difficulty in assembling comprehensive lists of employers and establishments. OSHA's Office of Management Data Systems is providing Minnesota with a list of employers from OSHA's data base in the 249 State-selected high hazard SIC's.

11. Kentucky

A list of high hazard industries based on BLS data using both Lost Workday case and Lost Workday rates (4 digit SIC's whenever possible) has been developed. Any industry with twice the average of either is considered high hazard; one-half, average-low; anything in between, medium. Lists are distributed to the field in groups of 50 (40 in high, 8 in medium, 1 in low and 1 in public sector). Concurrently, area supervisors schedule construction inspections which are also high hazard. In addition, for medium and low hazard industries, the State uses workers' compensation data, size and previous inspection history for targeting. Any industry falling within the top 20 for both Lost Workday Case and Lost Workday rates is a target for special emphasis.

12. New Mexico

Industries with a workers' compensation compensible incidence rate of 1.5 or greater and at least 300 employees are selected as high-hazard industries. Individual employers within these SIC's are chosen for inspection using a random number process. Dodge Reports are used for scheduling construction inspections. Primary nonferrous metal manufacturing, migrant housing and public employees are targeted for special emphasis.

13. North Carolina

Using workers' compensation data, a weighted index, by 2-digit SIC, has been developed taking into account Lost Workday (severity) rates, Lost Workday Case (frequency) rates, and number of employees in the industry. Establishments in high-hazard industries are inspected once every four years.

In addition, OSHA's ten Regional Administrators who enforce the OSH Act in 29 States and 4 jurisdictions are planning a variety of inspection-targeting demonstration experiments. These projects are purposely limited in scope -- by geography, by industry, or by other relevant factors such as occupation or types of hazards. Some of the answers being sought by these experiments are: Is the method tested feasible? How do its costs compare to current practice? Can it be implemented successfully elsewhere in the country? In the long run, will the method being tested lead to reduction in worker injury rates? Are the results of inspections conducted as a result of the targeting method being tested different from results of similar inspections targeted under the present high hazard method? Are more or different kinds of hazards found?

OSHA expects to have some of these answers by the end of the year and will keep the Committee informed as to the progress of ongoing demonstration projects.

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The CHAIRMAN. I know that you have spent a great deal of time with us over the last few weeks. And I am sure it is time that we will look back on as well spent.

I now call Mr. Robert T. Thompson, chairman of the Labor Relations Committee of the U.S. Chamber of Commerce.

And Senator Schweiker will be in charge of this workplace for a few minutes, while I make a phone call.

Senator SCHWEIKER. How are we defining that workplace, Mr. Chairman?

Mr. Thompson, do you want to introduce your associates, please?

STATEMENT OF ROBERT T. THOMPSON, CHAIRMAN, LABOR RELATIONS COMMITTEE, U.S. CHAMBER OF COMMERCE, ACCOMPANIED BY TED M. WIRE, MANAGER, OCCUPATIONAL SAFETY AND HEALTH, DEERE & CO., MOLINE, ILL., AND MARK A. DE BERNARDO, LABOR RELATIONS ATTORNEY, U.S. CHAMBER OF COMMERCE

Mr. THOMPSON. Mr. Chairman, Senator Hatch, my name is Robert Thompson, I am senior partner in the law firm of Thompson, Mann & Hutson of Greenville, S.C. I am also treasurer of the U.S. Chamber of Commerce and serve as the chairman of its Labor Relations Committee. Accompanying me are Ted M. Wire and Mark A. de Bernardo. Mr. Wire is the manager of occupational safety for Deere & Co., and a noted safety professional who has written and spoken extensively on workplace safety and health topics. He is also a member of the Chamber's OSHA task force. Mr. De Bernardo is a labor relations attorney on the staff of the U.S. Chamber and serves as the committee executive of its OSHA task force.

If it please the committee, I will attempt to summarize my written remarks, rather than cover the entire text.

Senator SCHWEIKER. That will be fine. Without objection, we will put your whole statement in the record. We appreciate your assessing of the time situation.

Mr. THOMPSON. We welcome this opportunity to express our views on proposed amendments to the Occupational Safety and Health Act of 1970. We support S. 2153 with certain amendments in specific areas.

Recently, we testified before this committee on OSHA oversight. We stated that many of the concerns that we had with the act, and how it has been administered, would be rectified by a performance-based approach to enforcement, as embodied in S. 2153.

We reiterate our strong support for the concepts and underlying principles of this bill, while noting that we, and our members, have reservations about the feasibility, desirability, and equity of some of its provisions.

In 2 weeks we will mark the ninth anniversary of the effective date of the act and its enforcement by the Occupational Safety and Health Administration. As detailed in our earlier oversight testimony, OSHA has not been effective in protecting the American work force. This conclusion is not only statistically borne out by the Labor Department's own data, it is a conclusion drawn from the widespread frustration and disappointment with OSHA by our members.

OSHA has become a prime focus of deregulatory attention, and rightfully so. Perhaps no other Federal agency triggers such vehement and widespread employer wrath as OSHA. The question is what OSHA has done: Polarized parties on safety and health issues; intruded into the collective-bargaining arena; and enforced an adversarial, and somewhat arbitrary, crime-and-punishment approach to what is a common concern of all parties—protecting the American worker.

And the reason is what OSHA has not done: It has not had a significant impact on workplace safety and health, despite nearly a decade of massive regulatory effort. Employers simply feel that OSHA is not helping them protect their workers, and the Labor Department's own statistics support this contention.

If we take the principle of cost-benefit analysis, which OSHA applies in varying degrees to its standards, and apply it to the agency itself, the following facts stand out.

In the 1970s, business spent $25.3 billion trying to comply with OSHA standards. In 1979 alone, business spent $4.9 billion on OSHA compliance efforts, an increase of more than 93 percent since OSHA's first full year of operations in 1972.

The total OSHA budget for the 1970s exceeded $1 billion.

The total budget for OSHA and its research, judicial, and State appendages exceeded $1.5 billion in the 1970s.

OSHA's current budget of $183 billion is up more than 410 percent since its first full year of operations.

Now let's look at what should be the benefits.

Since OSHA's inception in 1971, both the number and severity of serious injuries are up substantially. The rate of serious injuries is up 25 percent and their severity rate, measured in days off the job, is up more than 34 percent. It should be noted that rates render fluctuations in the size of the work force irrelevant.

During a comparable 8-year period prior to 1971, when industry was handling safety and health responsibilities itself, there was a steady decline in both the serious injury and fatality rates in the workplace. In fact, statistics show a trend of significant decrease in industry's fatality and serious injury rates from World War II to 1971.

Under Dr. Eula Bingham's administration, since March 23, 1977, statistics to date show that the workplace fatality rate is up 13 percent and the rate of serious injuries is up 18 percent. Furthermore, the severity rate of serious injuries, as measured in days off the job, is up 7 percent, and the total injury rate is up 3 percent.

These can hardly be termed benefits.

What emerges is a picture of an agency which imposed heavy costs on business, consumers, and taxpayers, while injury and illness statistics apparently suggest that (1) workers were safest prior to OSHA, (2) workers became less safe in OSHA's first six years, and (3) workers have been least safe under the present administration of Eula Bingham.

Statistics have their limitations. OSHA has taken some positive steps under Dr. Bingham, and OSHA generally has heightened both employers' and employees' consciousness of safety and health concerns. Nevertheless, after 9 years of massive regulatory and compliance effort, Americans can only be disappointed in OSHA's performance and frustrated that a more substantial reworking of the agency has not been accomplished.

Beyond OSHA's record, OSHA's image also justifies the call for reform. As disturbing as the agency's own statistics are, a more bothersome fact has emerged during the recent hearings and regulatory debate. Regardless of its record, OSHA has not convinced the business community, and to a large extent the public, that it has had a significant impact on occupational safety and health. Many employers are convinced that OSHA has accomplished little or nothing, and cannot help them protect their employees. Such a perception, although largely warranted, can only contribute to the frustration of OSHA's efforts to achieve its goals.

This is a tragic side of an issue as important as the health and safety of our workers: that OSHA's insistence on a punitive, rather than a corrective approach, has fostered confrontation, conflict, and litigation. This pattern is likely to remain constant as long as OSHA insists on being a policeman to all employers, even the most safe and the most responsible.

A major impediment to any change in OSHA is the regressive posture and instinctive resistance of organized labor. We will deal early in our testimony with this point, since we consider it a critical one.

On the one side, there are those who favor repeal of the act and whose sole concern is not to work with OSHA, but against it. On another side are those who resist any change at all, or whose answer is not to refocus, but to reaffirm what has already been shown to be a failure.

Is such polarization necessary? Moreover, do not such steadfast views obscure the real issues and ignore the ultimate concern of the act—workers?

S. 2153, the Occupational Safety and Health Improvements Act of 1980, is a moderate bill and a responsible attempt to improve workplace safety and health. The question is whether political moderation can survive in the atmosphere of such an emotional and provocative issue as worker health and safety.

With broad bipartisan sponsorship, this bill at various stages was offered for comment to the different parties at interest in this field. The sponsors, though philosophically diverse, in the interest of protecting the American worker, shared a common concern regarding OSHA's ineffectiveness.

But what has been the reaction? Organized labor has expressed total opposition to S. 2153, steadfastly refusing to consider any proposal for refocusing OSHA. OSHA has smugly denounced the bill as legislative interference, and insisted it could keep its own house in order administratively. Such lack of moderation is counterproductive to the ultimate goals of the act. Only the business sector has offered constructive concern for a bill which, though not without significant problems, is a reasonable and proper step toward lessening the conflict and furthering the correction of safety and health problems.

These purposes of the act, and the safety of workers which it represents, are far too important for this issue, or this bill, to be used as a political football. Yet this is what organized labor has shown itself all too willing to do.

The union response to OSHA reform has been indefensible. After recent losses on labor issues before Congress, organized labor has now turned against the OSHA reform movement, not on the merits of the case or with a constructive approach, but for political expediency. The unions are using this bill as a mechanism to promote solidarity and bind their wounds. Despite such alarming current administration figures as a 13-percent increase in the fatality rate, and an 18-percent increase in the serious injury rate, the unions are willing to misuse a good faith, responsible effort for better workplace safety—S. 2153 and its House counterpart, H.R. 6692—as a strategy to rally the troops.

Organized labor has wildly exaggerated the threats they claim this bill poses. The AFL-CIO has called S. 2153 potentially deadly for workers. The United Electrical Workers union says the bill would turn OSHA into a coroner's office. The United Auto Workers union claims the bill gives employers a license to maim and kill.

These statements are illogical and unsubstantiated. Moreover, they do not address the bill substantively, and ignore the need for positive recommendations for changes in the bill.

Even more reprehensible are the tactics of much of organized labor: threatening to picket the rallies and speeches of sponsors facing reelection; publishing a "wanted" poster of a sponsor, alleging a conspiracy to maim, injure, and kill thousands of American workers; picketing the home of a sponsor where only an 85-year-old parent was in residence; and circulating blatantly spurious conflict of interest charges by a substantially OSHA-financed—$95,000 under OSHA's vaunted "New Directions" education program—union group, charges which were published in several major newspapers.

While indicting an irresponsible union overreaction, based more on symbolism than on substance, we appeal to all parties to recognize the need for collegiality and collective effort. Faced with the present crisis of confidence in OSHA, and increasing momentum for OSHA reform in particular, and regulatory reform in general, it is more productive to contemplate moderate proposals such as S. 2153 than to dogfight to the mutual disadvantage of employer and employee alike.

S. 2153 does not present all the answers to OSHA's failures and frustrations. However, it is clear, after a decade without improvement, that something must be done to refocus the agency's priorities and efforts.

Business is not out to repeal or gut OSHA, as some opponents of reform have charged. It merely recognizes that OSHA's present approach is not working, and a new approach must be tried. More than ever, it is the time for rational discussion of ways to reform OSHA.

OSHA has embraced a system of punitive enforcement which assumes that the fear of being caught is what will persuade employers to be responsible in their safety and health programs. While OSHA has attempted to be the policeman to virtually all employers, an impossible task, safe worksites are being inspected and less safe worksites are ignored or are cited for alleged violations that have little to do with workplace safety and health.

OSHA should be targeted away from the safe workplaces, where its intrusions are unwarranted, and should be targeted to where the hazards really exist. By recognizing safe employers, S. 2153 would help effectuate this targeting of OSHA to where it is most needed and where it can be most effective, while also encouraging cooperation and good safety performance.

Under a performance-based concept, as embodied in S. 2153, employers would be able to direct their safety activities toward preventing injuries, not preventing citations.

It is appropriate to consider several facts in weighing the benefits of targeted versus random inspections.

S. 2153's basis for targeting is noted in these facts:

There are 4.38 million workplaces in the United States.

There are 996 Federal OSHA safety compliance officers.

OSHA conducted 57,937 inspections in fiscal year 1979.

More than 71 percent of OSHA's fiscal year 1979 inspections, over 41,000, resulted in not a single serious citation being issued. Repeat and willful citations were issued on only 3.9 percent and 1 percent, respectively, of OSHA's inspections.

More than 46 percent of all OSHA's fiscal year 1979 inspections, over 26,000, found no hazard at all, even nonserious. This means OSHA conducted nearly half its inspections at what it found to be hazard-free worksites.

Almost 35 percent of OSHA's fiscal year 1979 inspection efforts—over 20,000 inspections—were conducted reacting to employee complaints, many of which were anonymous.

The U.S. General Accounting Office recently reported that nearly all complaints—and this is significant in view of earlier discussion here this morning—nearly all complaints, more than 96 percent, were spurious or related to nonserious hazards only, and only 1 percent were even considered potentially to pose an imminent danger. Moreover, for 80 percent of the reviewed complaints, no violations were found that related to the items listed in the complaints.

The need for targeting OSHA's enforcement activities is obvious. With limited resources and the vast number of possible inspection sites, OSHA can hardly afford to conduct nearly half of its inspections at totally safe workplaces. Moreover, OSHA's overreaction to employee complaints, long the object of abuse by employees and nonemployees alike, indicate an even greater misallocation of limited resources.

Critics of S. 2153 argue that keeping inspectors away from the relatively safe worksites is questionable because it lessens the preventive effect of prospective surveillance. This miscasts the impetus for both prevention and exemption. It assumes that safe employers are safe only because of OSHA's prospective surveillance, rather than the more compelling economic and moral motives independent of, and long preceding, the threat of OSHA. Further, this statement assumes that prospective surveillance is OSHA's most effective route, rather than the targeting of limited inspection resources to where they can be most effective. OSHA is certainly not targeting its enforcement well now: 71 percent of its inspections find no serious hazard and 46 percent of its inspections find no hazard at all. This record contradicts OSHA's claim that it consistently polices occupational safety and health problems, since it indicates both a lack of consistency and OSHA's propensity for attacking nonproblems.

A common defense by OSHA is that it does not need congressional direction on how and where to target, as S. 2153 would provide, because it is already targeting its enforcement.

When questioned in regard to the need for targeting at the recent oversight hearings, OSHA spokesmen stated that the agency is targeting already to 2 percent of workplaces. When almost one-half of the inspections find no hazard and over two-thirds find no serious hazard, it appears somewhat ludicrous for OSHA to claim it is targeting well on its own. After 9 years of operation and 3 years of Bingham's administration, is this the best targeting OSHA can accomplish? More importantly, are we willing to give OSHA even more time to prove itself so we can find out? Or will Congress, with an eye on rising injury rates and wasted OSHA inspection efforts, take it upon itself to mandate more effective targeting by enacting S. 2153?

OSHA targets its resources so poorly because of a number of reasons.

First, OSHA targets by industry, not business. OSHA attempts to identify what it determines to be hazardous and nonhazardous industries, as a genre; not hazardous and nonhazardous businesses in particular. This obscures the reality that within a hazardous industry there may be a significant number of safe employers who neither need nor deserve inspections, while within nonhazardous industries, there are pockets of unsafe worksites which are ignored by OSHA because their industry is safe. S. 2153 would facilitate identification of hazardous and nonhazardous businesses individually, since worksite injury rate is the measure for acquiring an inspection exemption.

Second, OSHA lacks employer cooperation. OSHA's effort at locating hazards goes basically unaided, since there is little voluntary employer cooperation. Employers, put off by OSHA's adversarial posture and leery of identifying themselves, are not responsive. However, S. 2153 would provide an incentive for employers to come forward and report information which would enhance OSHA's ability to identify and locate the hazards.

Third, OSHA's bureaucratic routine hinders successful targeting. S. 2153 would force OSHA to better allocate its resources by exempting safe workplaces and freeing OSHA enforcement to be applied where most needed, where the hazards exist.

The need is for a system whereby employers and employees can concentrate on the desired end, not the insisted-upon means. The end, agreed upon by all concerned parties, is protection of the American work force. The means, often disagreed upon, should be secondary to the ultimate goal of saving lives and preventing injuries and illnesses.

I attended a ceremony last week in celebration of an operation which had experienced 6 million man-hours without any accident whatsoever. I did not see an OSHA representative present at that ceremony.

Former Secretary of Labor John Dunlop agrees that compliance cannot be compelled through a police effort in every workplace and that trying to force compliance primarily through threats of inspections and stiff fines has not proved successful.

In our prepared statement we point out the successful safety experience of Deere & Co. At the conclusion of my statement, I will defer to Mr. Wire to briefly elaborate on their program.

Critics of S. 2153 have wildly exaggerated the bill's impact. Unlike some earlier amendments proposed annually to the Labor-HEW appropriation bill, S. 2153 does not provide for blanket exemptions based solely on number of employees, rather than size; S. 2153 rewards businesses based on good performance.

The bill would not increase the risk of worker injury or ignore safety violations by exempt employers, as some opponents claim. Further, it would not permit business firms to ignore OSHA safety standards and regulations.

Simply stated, S. 2153 would promote continued improvements of industry's own workplace safety efforts by exempting from routine safety inspections business firms that can document good safety records.

Passage of S. 2153 would relieve safe business firms from needless routine inspections, and it would begin to change the adversarial posture and policies of an agency that has become a symbol of costly, yet ineffective, bureaucracy.

The thrust of this bill is laudable, and its concepts can help improve occupational safety and health. The U.S. Chamber supports these concepts wholeheartedly and, despite our concern with particular provisions, we recognize S. 2153 as legislation which deserves the committee's attention, support, and where necessary, improvement.

Although communications with our members indicate their strong support for the concepts contained in S. 2153, some concern has been expressed regarding specific provisions of the bill. Therefore, we offer the following recommendations:

On the definition of good safety record, S. 2153 defines good safety record in section 4A(c)(1). The bill provides a performance standard for employers with a good safety record that would relieve qualified employers from routine safety inspections. The bill directs that safety inspections be based on an employer's safety performance. This is an important concept that would redirect OSHA's safety enforcement toward problem areas while eliminating the unnecessary harassment of many employers.

In defining a performance standard, however, care must be taken that the standard is realistic, and provides an incentive through an achievable goal for the majority of employers. Otherwise, the standard becomes a disincentive for improved safety performance for those employers who could never qualify despite excellent safety programs. The standard should take into account the hazards encountered in each industry, and reward those in each industry whose record demonstrates safety consciousness and an ability to cope with the hazards encountered. I might add that the ceremony which I attended celebrating 6 million man-hours without an accident involved a construction company, one of the most, if not the most, hazardous industries.

Although we are not suggesting that exemptions from routine safety inspections be easily obtained, we are concerned that the present method of qualification could operate in an inequitable fashion. For example, we believe it is unfair to compare the safety records of heavy manufacturing with that of the retail trade. The proposal to exempt employers in low-risk industries is sound, because it eliminates unnecessary routine inspections. We recommend, however, that in addition the standard be set so as to reward a specified percentage of employers having the best safety records in each industry. This recommendation would provide an incentive for all employers to improve their safety programs, although obviously not all employers would qualify for exemption as a result. Rather, only the very safest would qualify, but the effect would be to raise the standard for all.

In this regard, we recommend that section 4A(c)(1) be revised to provide a standard for each industry based on the lost workday case incidence rate for the three-digit standard industrial classification group which applies to the workplace seeking qualification.

On accident reporting requirements, section 8(c)(3) of the Occupational Safety and Health Act requires the Secretary to prescribe accident-reporting procedures. Current OSHA regulations require notification within 48 hours of fatalities or the hospitalization of five or more employees. As currently defined, hospitalization is broadly interpreted to mean both preventive and curative treatment regardless of severity of injury, type of treatment, or length of stay.

In this regard, section 4(A)(a)(1)(A) of S. 2153 refers to hospitalization of more than one employee. To be consistent, we recommend that this section be revised to retain current OSHA provisions of reporting requirements for hospitalizations.

On use of State workers' compensation data, for purposes of identifying workplaces with good safety records, section 4A(b) of the bill utilizes existing State workers' compensation data. We strongly question the wisdom and feasibility of using this data, especially where less burdensome methods for identifying good safety records already exist. Such requirements would add substantial costs and increase reporting requirements, both of which are unnecessary to implement the components of S. 2153.

A better alternative would be a system utilizing the OSHA No. 200 Log and Summary of Occupational Injuries and Illnesses. This log is already required to be kept by all employers with 11 or more employees and contains information which would suffice for the purposes of the present bill. The right side of the form 200, the half which OSHA requires employers to post during the month of February, could be forwarded to OSHA with minimal expense and inconvenience.

As for employers of 10 or fewer employees, a system similar to the Schweiker amendment to the Labor-HEW appropriations bill of 1980, which provides fairly automatic small business exemptions from safety inspections, with significant exceptions, would be appropriate. This concept, which is already law, would ease the burden on small business, while simultaneously preventing an overabundant affidavit filing system which would be difficult for the agency to handle.

Another possible alternative is the use of industry cuts, similar to those utilized, to an extent, by OSHA already. The retail, wholesale, finance, and real estate industries, for example, could be given exemptions which would lighten the burden on both small business and OSHA. Use of SIC codes for this purpose would also help facilitate use of a more efficient, equitable, and inexpensive system of distinguishing safe workplaces.

Consultation provision, section 4A(g) of the bill, prohibits the use of in-house safety professionals to satisfy the consultation requirement necessary to qualify for a waiver of first-instance penalties. Such a limitation is infeasible and unwise. The availability of outside consultation is questionable, particularly since we already hear loud complaints about the dearth of safety and health professionals. Most of these professionals are already employed in industry and, by experience, are more familiar with the specific operating characteristics and potential safety hazards of the workplace.

In-house consultants, particularly those that are classified "certified safety professionals" and "registered professional engineers—safety," should qualify as consultants under the bill. The possibility of bias from professionals of this caliber and with these qualifications is remote. Further, they constitute the greatest resource industry has in helping insure protection of their workers. To exclude them from qualifying under this bill does a great disservice to the large body of dedicated, independently certified, safety professionals in industry.

Advisory committees. Some of our members are skeptical about section 4A(d)(1)(A)'s prescription for advisory safety committees, either because they feel this provision would facilitate unionization of nonunion shops, or because they feel the right of employee representatives to unilaterally bar the benefits of this provision to employers by refusing, even in bad faith, to participate has potential for grave abuse.

Many employers already have advisory safety committees at their plants and yet fear the intrusion of this provision on their existing programs. I would say most employers have some system of committees. Successful existing programs could be rendered unworkable because individual employees or groups may wish to deny employers the benefits of S. 2153.

We believe the obligation of the employer should be to provide the opportunity and the tools for employees to participate in securing a safe and healthful workplace. Nonetheless, this provision should be revised to prevent harassment or abuse.

The U. S. Chamber reaffirms its support for the objectives of the Occupational Safety and Health Act. Yet OSHA is not working. Government statistics indicate that, despite massive expenditures by industry to comply with OSHA and a growing Federal bureaucracy, the rate of serious injuries and illnesses is increasing.

Nine years of OSHA experience should be sufficient to convince Congress that reform is necessary. During the seventies, we presented our views on OSHA reform to numerous committees of Congress. While there have been several amendments to the act adopted by Congress as riders to annual Labor-HEW appropriations bills, there has never been a legislative amendment to the act reported out of the committees of jurisdiction. Attempts to legislate on appropriations bills demonstrate the frustrations of Members of Congress, their constituents, and the business community with the failure of the normal legislative process to face head on the issue of OSHA reform.

We thank the chairman and ranking minority member of this committee for scheduling these hearings, and we commend them and other committee members for sponsoring OSHA reform legislation. We recognize that they share our objective, which is to make OSHA more effective in accomplishing its goal.

I would now turn to my colleague, who will briefly describe a program which we feel is not only in the spirit of this proposed legislation, but is proof of the pudding.

[The prepared statement of Mr. Thompson follows:]

STATEMENT
on
S. 2153, THE "OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980"
before the
SENATE LABOR AND HUMAN RESOURCES COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Robert T. Thompson
April 15, 1980

My name is Robert T. Thompson. I am senior partner in the law firm of Thompson, Mann and Hutson of Greenville, South Carolina. I am also Treasurer of the U.S. Chamber and serve as the Chairman of its Labor Relations Committee. Accompanying me are Ted H. Wire and Mark A. de Bernardo. Mr. Wire is the Manager of Occupational Safety for Deere & Co., and a noted safety professional who has written and spoken extensively on workplace safety and health topics. He is also a member of the Chamber's OSHA Task Force. Mr. de Bernardo is a labor relations attorney on the staff of the U.S. Chamber, and serves as the Committee Executive of its OSHA Task Force.

The U.S. Chamber is the largest federation of business and professional organizations in the United States, and it is the principal spokesman for the American business community. It represents more than 90,000 business firms, 2,600 state and local chambers of commerce, and 1,300 trade and professional associations. More than 85 percent of the Chamber's members are small business firms having fewer than 100 employees. In addition, more than 750 local chambers of commerce which are members of the Chamber have established small business councils. The U.S. Chamber speaks for, and is vitally concerned with, small business issues in the legislative and regulatory arenas. While our remarks today are on behalf of all the members of the U.S. Chamber, we are especially cognizant of the problems of small businesses with the administration of the Act.

We welcome this opportunity to express our views on proposed amendments to the Occupational Safety and Health Act of 1970 (the "Act"). We support S. 2153, with certain amendments in specific areas.

Recently, we testified before this Committee on OSHA oversight. We stated that many of the concerns we had with the Act, and how it has been administered, would be rectified by a performance-based approach to enforcement as embodied in S. 2153.

We reiterate our strong support for the concepts and underlying principles of this bill, while noting that we, and our members, have reservations about the feasibility, desirability, and equity of some of its provisions.

I. THE NEED FOR REFORM: OSHA's RECORD

In two weeks we will mark the ninth anniversary of the effective date of the Act and its enforcement by the Occupational Safety and Health Administration ("OSHA"). As detailed in our earlier oversight testimony, OSHA has not been effective in protecting the American work force. This conclusion is not only statistically borne out by the Labor Department's own data, it is a conclusion drawn from the widespread frustration and disappointment with OSHA by our members.

OSHA has become a prime focus of deregulatory attention, and rightfully so. Perhaps no other Federal agency triggers such vehement and widespread employer wrath as OSHA. The reason is what OSHA has done: polarized parties on safety and health issues; intruded into the collective bargaining arena; and enforced an adversarial, and somewhat arbitrary, crime and punishment approach to what is a common concern for all parties — protecting the American worker.

And the reason is what OSHA has not done: it has not had a significant impact on workplace safety and health, despite nearly a decade of massive regulatory effort. Employers simply feel that OSHA is not helping them protect their workers, and the Labor Department's own statistics support this contention.

If we take the principle of cost-benefit analysis, which OSHA applies in varying degrees to its standards, and apply it to the agency itself, the following facts stand out.

A. COSTS — Weighing The Economic Considerations:

- In the '70s, business spent $25.3 billion trying to comply with OSHA standards. In 1979 alone, business spent $4.9 billion on OSHA compliance efforts, an increase of more than 93% since OSHA's first full year of operations in 1972.[1]
- The total OSHA budget for the '70s exceeded $1 billion.[2]
- The total budget for OSHA and its research (NIOSH), judicial (OSHRC), and state (state OSHAs) appendages exceeded $1.5 billion in the '70s.[3]
- OSHA's current budget of $183 million is up more than 410% since its first full year of operations.[4]

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[1] McGraw/Hill Annual Surveys of Employee Safety and Health Expenditures by American Industry, 1972-79.

[2] U.S. Government Budgets, FY 1971-80.

[3] U.S. Government Budgets, OSHA Office of Information, FY 1971-80.

[4] U.S. Government Budget, FY 1980.

B. BENEFITS -- Evaluating OSHA's Performance:

- Since OSHA's inception in 1971, both the number and severity of serious injuries are up substantially. The rate of serious injuries is up 25% and their severity rate, measured in days off the job, is up more than 34%. It should be noted that rates render fluctuations in the size of the work force irrelevant.[5]
- During a comparable eight-year period prior to 1971, when industry was handling safety and health responsibilities itself, there was a steady decline in both the serious injury and fatality rates in the workplace. In fact, statistics show a trend of significant decrease in industry's fatality and serious injury rates from World War II to 1971.[6]
- Under Eula Bingham's administration -- since March 23, 1977 -- statistics to date show that the workplace fatality rate is up 13% and the rate of serious injuries is up 18%. Furthermore, the severity rate of serious injuries -- as measured in days off the job -- is up 7%, and the total injury rate is up 3%.[7]

What emerges is a picture of an agency which imposed heavy costs on business, consumers, and taxpayers, while injury and illness statistics apparently suggest that (1) workers were safest prior to OSHA, (2) workers became less safe in OSHA's first six years, and (3) workers have been least safe under the present administration of Eula Bingham.

Statistics have their limitations. OSHA has taken some positive steps under Dr. Bingham, and OSHA generally has heightend both employers' and employees' consciousness of safety and health concerns. Nonetheless, after nine years of massive regulatory and compliance effort, Americans can only be disappointed in OSHA's performance and frustrated that a more substantial reworking of the agency has not been accomplished.

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[5] Department of Labor's Bureau of Labor Statistics, April, 1980.

[6] National Safety Council Statistics, 1964-71, 1965-71.

[7] DOL's Bureau of Labor Statistics, April, 1980.

II. THE NEED FOR REFORM: OSHA'S IMAGE

As disturbing as the agency's own statistics are, a more bothersome fact has emerged during the recent hearings and regulatory debate. Regardless of its record, OSHA has not convinced the business community, and to a large extent the public, that it has had a significant impact on occupational safety and health. Many employers are convinced that OSHA has accomplished little or nothing, and cannot help them protect their employees. Such a perception, although largely warranted, can only contribute to the frustration of OSHA's efforts to achieve its goals.

As we discussed in our oversight testimony, OSHA's single biggest failure in the '70s may have been its inability to earn acceptance in any significant portion of the business community.

This is a tragic side of an issue as important as the health and safety of our workers: that OSHA's insistence on a punitive, rather than a corrective approach, has fostered confrontation, conflict, and litigation. This pattern is likely to remain constant as long as OSHA insists on being a policeman to all employers, even the most safe and the most responsible.

III. UNION OVERREACTION

A major impediment to any change in OSHA is the regressive posture and instinctive resistance of organized labor. We will deal early in our testimony with this point, since we consider it a critical one.

A. A Modest Bill

On the one side, there are those who favor repeal of the Act and whose sole concern is not to work with OSHA, but against it. On another side are those who resist any change at all, or whose answer is not to refocus, but to reaffirm what has already been shown to be a failure.

Is such polarization necessary? Moreover, do not such steadfast views obscure the real issues and ignore the ultimate concern of the Act -- workers?

S. 2153, "The Occupational Safety and Health Improvements Act of 1980," is a moderate bill and a responsible attempt to improve workplace safety and health. The question is whether political moderation can survive in the atmosphere of such an emotional and provocative issue as worker health and safety.

With broad bipartisan sponsorship, this bill at various stages was offered for comment to the different parties at interest in this field. The sponsors, though philosophically diverse, in the interest of protecting the American worker, shared a common concern regarding OSHA's ineffectiveness.

But what has been the reaction? Organized labor has expressed total opposition to S. 2153, steadfastly refusing to consider any proposal for refocusing OSHA. OSHA has smugly denounced the bill as legislative interference, and insisted it could keep its own house in order administratively. Such lack of moderation is counterproductive to the ultimate goals of the Act. Only the business sector has offered constructive concern for a bill which, though not without significant problems, is a reasonable and proper step toward lessening the conflict and furthering the correction of safety and health problems.

These purposes of the Act, and the safety of workers which it represents, are far too important for this issue, or this bill, to be used as a political football. Yet, this is what organized labor has shown itself all too willing to do.

B. Union Conduct

The union response to OSHA reform has been indefensible. After recent losses on labor issues before Congress, organized labor has now turned against the OSHA reform movement, not on the merits of the case or with a constructive approach, but for political expediency. The unions are using this bill as a mechanism to promote solidarity and bind their wounds. Despite such alarming current administration figures as a 13% increase in the fatality rate, and an 18% increase in the serious injury rate, the unions are willing to misuse a good faith, responsible effort for better workplace safety — S. 2153 and its House counterpart, H.R. 6692 -- as a strategy to rally the troops.

Organized labor has wildly exaggerated the "threats" they claim this bill poses. The AFL-CIO has called S. 2153 "potentially deadly for workers." The United Electrical Workers' union says the bill "would turn OSHA into a coroner's office." The United Auto Workers' union claims the bill "gives employers a license to maim and kill."

These statements are illogical and unsubstantiated. Moreover, they do not address the bill substantively, and ignore the need for positive recommendations for changes in the bill.

Even more reprehensible are the tactics of much of organized labor: threatening to picket the rallies and speeches of sponsors facing reelection; publishing a "wanted" poster of a sponsor, alleging a "conspiracy to maim, injure, and kill thousands of American workers;" picketing the home of a sponsor where only an 85-year-old parent was in residence; and circulating blatantly spurious conflict of interest charges by a substantially OSHA-financed ($95,000 under OSHA's vaunted "New Directions" education program) union group -- charges which were published in several major newspapers.

While indicting an irresponsible union overreaction -- based more on symbolism than substance — we appeal to all parties to recognize the need for collegiality and collective effort. Faced with the present crisis of confidence in OSHA, and increasing momentum for OSHA reform in particular, and regulatory reform in general, it is more productive to contemplate moderate proposals such as S. 2153, than to dogfight to the mutual disadvantage of employer and employee alike.

S. 2153 does not present all the answers to OSHA's failures and frustrations. However, it is clear, after a decade without improvement, that something must be done to refocus the agency's priorities and efforts.

Business is not out to repeal or "gut" OSHA, as some opponents of reform have charged. It merely recognizes that OSHA's present approach is not working, and a "new approach" must be tried. More than ever, it is the time for rational discussion of ways to reform OSHA.

IV. THE NEW APPROACH OF S. 2153: PERFORMANCE

OSHA has embraced a system of punitive enforcement which assumes that the fear of "being caught" is what will persuade employers to be responsible in their safety and health programs. While OSHA has attempted to be the policeman to virtually all employers -- an impossible task -- safe worksites are being inspected[8] and less safe worksites are ignored[9] or are cited for alleged violations that have little to do with workplace safety and health.

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[8] In FY 1979, 71 percent of OSHA's inspections found no serious hazard and 46 percent found no hazard at all.

[9] While OSHA directs a vast majority of its enforcement attention to workplaces without serious hazards, as indicated in footnote eight, serious injuries have proliferated, up 25 percent since OSHA's inception, up 18 percent since Bingham's appointment, up 8 percent in the last recorded year (1978). In fact, while OSHA conducts over 25,000 inspections of what it determines to be totally safe work sites (26,787 such inspections in FY 1979), over 2 million lost workday accidents occur on the job (2,492,000 in the most recently recorded year -- 1978).

OSHA should be targeted away from the safe workplaces, where its intrusions are unwarranted, and should be targeted to where the hazards really exist. By recognizing safe employers, S. 2153 would help effectuate this targeting of OSHA to where it is most needed and where it can be most effective, while also encouraging cooperation and good safety performance.

Under a performance-based concept, as embodied in S. 2153, employers would be able to direct their safety activities toward preventing injuries, not preventing citations.

(A.) The Mathematical Logic of Targeting

It is appropriate to consider several facts in weighing the benefits of targeted versus random inspections.

S. 2153's Basis For Targeting:

- There are 4.38 million workplaces in the United States.[10]
- There are 996 Federal OSHA safety compliance officers.[11]
- OSHA conducted 57,937 inspections in FY 1979.[12]
- More than 71% of OSHA's FY 1979 inspections -- 41,269 -- resulted in not a single "serious" citation being issued. "Repeat" and "willful" citations were issued on only 3.9% and 1%, respectively, of OSHA's inspections.[13]
- More than 46% of all OSHA's FY 1979 inspections -- 26,787 -- found no hazard at all -- even non-serious. This means OSHA conducted nearly half its inspections at what it found to be hazard-free work sites.[14]
- Almost 35% of OSHA's FY 1979 inspection efforts -- 20,170 -- inspections were conducted reacting to "employee" complaints, many of which were anonymous.[15]

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[10] Department of Labor's Bureau of Labor Statistics, March, 1980.

[11] OSHA Office of Information, March, 1980.

[12] OSHA's Office of Management Data Systems (OMDS), March, 1980.

[13] Ibid.

[14] Ibid.

[15] Ibid.

- The U.S. Government Accounting Office (GAO) recently reported that nearly all complaints -- more than 96% -- were spurious or related to non-serious hazards only, and only 1% were even considered potentially to pose an imminent danger. Examples of non-serious hazards which GAO gave included numerous dirty bathrooms, cold showers, a loose sign above a Pittsburgh department store counter, and three formal complaints in Maryland to OSHA because employees were "not allowed to go to the bathroom during breaks." Moreover, for 80% of the reviewed complaints, no violations were found that related to the items listed in the complaints.[16]

The need for targeting OSHA's enforcement activities is obvious. With limited resources and the vast number of possible inspection sites, OSHA can hardly afford to conduct nearly half of its inspections at totally safe workplaces. Moreover, OSHA's overreaction to "employee" complaints, long the object of abuse by employees and non-employees alike, indicate an even greater misallocation of limited resources.

Critics of S. 2153 argue that keeping inspectors away from the relatively safe worksites is questionable because it lessens the preventive effect of "prospective surveillance." This miscasts the impetus for both prevention and exemption. It assumes that "safe" employers are safe only because of OSHA's "prospective surveillance," rather than the more compelling economic and moral motives independent of, and long preceeding, the threat of OSHA. Further, this statement assumes that prospective surveillance is OSHA's most effective route, rather than the targeting of limited inspection resources to where they can be most effective. OSHA is certainly not targeting its enforcement well now -- 71% of its inspections find no serious hazard and 46% of its inspections find no hazard at all.[17] This record contradicts OSHA's claim that it consistently polices occupational safety and health problems, since it indicates both a lack of consistency and OSHA's propensity for attacking "non-problems."

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[16] U.S. Government Accounting Office report entitled "How Effective are OSHA's Complaint Procedures?," April, 1979.

[17] Based on FY 1979 figures, OSHA's Office of Management Data Systems.

B. Why OSHA Targets Poorly By Itself

A common defense by OSHA is that it does not need Congressional direction on how and where to target, as S. 2153 would provide, because it is already targeting its enforcement.

Senator Schweiker, a sponsor of S. 2153, questioned Basil Whiting, Deputy Assistant Secretary of Labor, on OSHA's targeting process during the recent oversight hearings. When asked if it made sense for OSHA to concentrate on ten percent of workplaces, as S. 2153 would have it, Whiting replied that OSHA is already concentrating on two percent of workplaces by its own administrative "cuts" and targeting.[18]

When almost one-half of the inspections find no hazard and over two-thirds find no serious hazard, it appears somewhat ludicrous for OSHA to claim it is targeting well on its own. After nine years of operation and three years of Bingham's administration, is this the best targeting OSHA can accomplish? More importantly, are we willing to give OSHA even more time to prove itself so we can find out? Or will Congress, with an eye on rising injury rates and wasted OSHA inspection efforts, take it upon itself to mandate more effective targeting by enacting S. 2153?

Why does OSHA target its resources so poorly by itself?

(1.) OSHA targets by industry, not business

OSHA attempts to identify what it determines to be hazardous and non-hazardous industries, as a genre; not hazardous and non-hazardous businesses in particular. This obscures the reality that within a "hazardous" industry there may be a significant number of "safe" employers who neither need nor deserve inspections, while within "non-hazardous" industries, there are pockets of "unsafe" worksites which are ignored by OSHA because their industry is safe. S. 2153 would facilitate identification of hazardous and non-hazardous businesses individually, since worksite injury rate is the measure for acquiring an inspection exemption.

(2.) OSHA lacks employer cooperation

OSHA's effort at locating hazards goes basically unaided, since there is little voluntary employer cooperation. Employers, put off by OSHA's adversarial posture and leery of identifying themselves, are not responsive. However, S. 2153 would provide an incentive for employers to come forward and report information which would enhance OSHA's ability to identify and locate the hazards.

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[18] OSHA Oversight Hearing, Senate Labor and Human Resources Committee, March 21, 1980.

(3.) OSHA's routine mediocrity

A final reason why OSHA has failed to target its inspection resources effectively is bureaucratic lethargy. S. 2153 would force OSHA to better allocate its resources by exempting safe workplaces and freeing OSHA enforcement to be applied where most needed -- where the hazards exist.

C. Beyond Targeting, The Justification For A Performance Concept

OSHA's poor record gives credence to the theory that voluntary safety and health programs by employers, working with their employees, is the only viable method of stemming workplace injuries.

Several factors point to the logic of a performance concept:

- As discussed earlier, NSC statistics indicate that industry was doing a good job of "policing" itself.
- Employers have compelling interests to prevent injuries, independent of OSHA, including the high costs of workers' compensation, the need to ensure high worker morale and preserve expertise on the job, and the moral duty and commitment of employers to their employees.
- OSHA-required administrative burdens and paperwork do not of themselves save one life or prevent one injury in the workplace. Safety dollars and personnel time expended on these concerns may be wasted, whereas exemptions would foreclose much of this burden.
- Industry may be better able to effectuate protection of its own workers through its own efforts. Often an employer has been running his workplace for years or even decades, often with the same employees. He may know best where the hazards are and how best to abate these hazards.
- With a performance concept, employers again are ultimately responsible for protecting their workers. Preventing injuries, not preventing citations, is reinstituted as the predominant motive. There is a tendency among some employers, under OSHA's present enforcement system, to rely on being in compliance with OSHA's physical standards as the sole indicator of whether their workplace is safe.

Since alternative methods of guaranteeing a safe environment often exist, employers may be in the best position to exercise and best judge the options as to their relative merits and advisability.

The need is for a system whereby employers and employees can concentrate on the desired end, not the insisted-upon means. The "end," agreed upon by all concerned parties, is protection of the American workforce. The means, often disagreed upon, should be secondary to the ultimate goal of saving lives and preventing injuries and illnesses.

The aim is protecting workers. Whether it's done OSHA's way or the employer's way, if employees are protected, that aim is achieved. Good performance, however achieved, must be recognized and rewarded by OSHA.

D. The Experiences of Deere & Co.

Good performance in occupational safety and health has been a hallmark of Deere & Co., which is represented here today by Ted Wire, Deere's Manager of Occupational Safety.

The John Deere division, a heavy manufacturer of equipment, with eleven manufacturing plants and 51,000 employees, developed a performance-based approach to workplace safety some five years before S. 2153 was introduced. Their experience is enlightening.

While following OSHA's approach from 1972 to 1974, John Deere experienced a 42 percent increase in injuries. Disappointed in OSHA's approach, and recognizing that compliance with OSHA's physical standards did not reduce employee injuries, Deere's management switched to a performance approach -- concentrating on eliminating injuries; identifying the hazards not by OSHA regulations, but by where and how they occurred; and taking the responsibility for protecting workers into their own hands.

The result: By 1980, injuries were reduced by 74 percent. Furthermore, serious injuries decreased 76 percent and days off the job were reduced 89 percent.

Deere & Co. believes occupational safety and health is the employer's job.

Despite such performance success stories as this one, OSHA has continued the same basic approach as 1974, when John Deere's injuries were rising rapidly.

The policeman approach does not work.

Former Secretary of Labor John Dunlop agrees, "compliance cannot be compelled through a police effort in every workplace ... trying to force compliance primarily through threats of inspections and stiff fines has not proved successful.[19]

E. What S. 2153 Will Not Do

Critics of S. 2153 have wildly exaggerated the bill's impact. Unlike some earlier amendments proposed annually to the Labor-HEW appropriation bill, S. 2153 does not provide for blanket exemptions based solely on number of employees, rather than size, S. 2153 rewards businesses based on good performance.

The bill would not increase the risk of worker injury or ignore safety violations by exempt employers, as some opponents claim. Further, it would not permit business firms to ignore OSHA safety standards and regulations.

Simply stated, S. 2153 would promote continued improvements of industry's own workplace safety efforts by exempting from routine safety inspections business firms that can document good safety records.

Passage of S. 2153 would relieve safe business firms from needless routine inspections, and it would begin to change the adversarial posture and policies of an agency that has become a symbol of costly, yet ineffective, bureaucracy.

V. U.S. CHAMBER SUPPORT FOR THE CONCEPTS OF S. 2153

The thrust of this bill is laudable, and its concepts can help improve occupational safety and health. The U.S. Chamber supports these concepts whole-heartedly and, despite our concern with particular provisions, we recognize S. 2153 as legislation which deserves the Committee's attention, support, and, where necessary, improvement.

A. We Support These Concepts of S. 2153:

- Performance-based exemptions (not size-based exemptions, as previous bills have featured).
- Incentives/rewards for good safety records.
- Targeting OSHA where it can be most effective.
- Taking OSHA away from the adversarial role of policeman to 100% of employers, restricting it to the 10%-15% of the workplaces where policing may be appropriate.

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[19] John Dunlop, Memorandum to President Ford, November 12, 1975.

- Performance concept, whereby once a good safety record is achieved, however it is done, OSHA stays away. Employers attack safety problems as they see fit, thereby concentrating on preventing injuries, not preventing citations.
- Greater utilization of private sector counsultation programs by employers.
- Advisory committees (some form of employee input and communication into the safety and health programs).

B. We Support the Benefits of S. 2153 Which Employers Can Qualify For:

- Routine safety inspection exemptions.
- First citation penaly waiver.
- Ceilings on the amounts of serious and non-serious penalties (not repeat or willful).
- Restrictions on OSHA's previously knee-jerk inspection reaction to employee complaints.[20]

VI. U.S. CHAMBER OPPOSITION TO SELECTED PROVISIONS OF S. 2153

Although communications with our members indicate their strong support for the concepts contained in S. 2153, some concern has been expressed regarding specific provisions of the bill. Therefore, we offer the following recommendations.

A. Definition of Good Safety Record

S. 2153 defines "good safety record" in Section 4A(c)(1). The bill provides a performance standard for employers with a "good safety record" that would relieve qualified employers from routine safety inspections. The bill directs that safety inspections be based on an employer's safety performance. This is an important concept that would redirect OSHA's safety enforcement toward problem areas while eliminating the unnecessary harassment of many employers.

In defining a performance standard, however, care must be taken that the standard is realistic, and provides an incentive through an achievable goal for the majority of employers. Otherwise, the standard becomes a disincentive for improved safety performance for those employers who could never qualify despite excellent safety programs. The standard should take into account the hazards encountered in each industry, and reward those in each industry whose record demonstrates safety consciousness and an ability to cope with the hazards encountered.

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[20] As discussed earlier, OSHA's modus operandi for responding to "employee" complaints is unacceptable and to an extent, is contrary to the purposes of the Act. Although OSHA has taken some positive steps in this direction in recent months, S. 2153's provision would better serve the Act's goals without abridging employee rights.

Although we are not suggesting that exemptions from routine safety inspections be easily obtained, we are concerned that the present method of qualification could operate in an inequitable fashion. For example we believe it is unfair to compare the safety records of heavy manufacturing with that of the retail trade. The proposal to exempt employers in low risk industries is sound, because it eliminates unnecessary routine inspections. We recommend, however, that in addition the standard be set so as to reward a specified percentage of employers having the best safety records in each industry. This recommendation would provide an incentive for all employers to improve their safety programs, although, obviously, not all employers would qualify for exemption as a result. Rather, only the very safest would qualify but the effect would be to raise the standard for all.

In this regard, we recommend that Section 4A(c)(1) be revised to provide a standard for each industry based on the lost workday case incidence rate for the three-digit Standard Industrial Classification (SIC) Group which applies to the workplace seeking qualification.

B. Accident Reporting Requirements

Section 8(c)(2) of the Occupational Safety and Health Act requires the Secretary to prescribe accident reporting procedures. Current OSHA regulations require notification within 48 hours of fatalities or the hospitalization of 5 or more employees. As currently defined, "hospitalization" is broadly interpreted to mean both preventative and curative treatment regardless of severity of injury, type of treatment, or length of stay.

In this regard, Section 4(A)(a)(1)(A) of the bill (S. 2153) refers to hospitalization of "more than one employee." To be consistent, we recommend that this section be revised to retain current OSHA provisions of reporting requirements for hospitalizations.

C. Use of State Workers' Compensation Data

For purposes of identifying workplaces with "good safety records," Section 4A(b) of the bill utilizes existing state workers' compensation data. We strongly question the wisdom and feasibility of using this data, especially where less burdensome methods for identifying good safety records already exist. Such requirements would add substantial costs and increase reporting requirements, both of which are unnecessary to implement the components of S. 2153.

A better alternative would be a system utilizing the OSHA No. 200 Log and Summary of Occupational Injuries and Illnesses. This log is already required to be kept by all employers with 11 or more employees and contains information which would suffice for the purposes of S. 2153. The right side of the Form 200, the half which OSHA requires employers to post during the month of February, could be forwarded to OSHA with minimal expense and inconvenience.

As for employers of 10 or fewer employees, a system similar to the Schweiker amendment to the Labor/HEW Appropriations Bill of 1980, which provides fairly automatic small business exemptions from safety inspections -- with significant exceptions -- would be appropriate. This concept, which is already law, would ease the burden on small business, while simultaneously preventing an over-abundant affadavit filing system which would be difficult for the agency to handle.

Another possible alternative is the use of industry "cuts," similar to those utilized, to an extent, by OSHA already. The retail, wholesale, finance, and real estate industries, for example, could be given exemptions which would lighten the burden on both small business and OSHA. Use of SIC codes for this purpose would also help facilitate use of a more efficient, equitable, and inexpensive system of distinguishing safe workplaces.

D. Consultation Provision

Section 4A(g) of the bill prohibits the use of in-house safety professionals to satisfy the consultation requirement necessary to qualify for a waiver of first instance penalties. Such a limitation is infeasible and unwise. The availability of outside consultation is questionable, particularly since we already hear loud complaints about the dearth of safety and health professionals. Most of these professionals are already employed by industry, and, by experience, are more familiar with the specific operating characteristics and potential safety hazards of the workplace.

In-house consultants, particularly those that are classified "certified safety professionals" and "registered professional engineers - safety," should qualify as consultants under the bill. The possibility of bias from professionals of this caliber and with these qualifications is remote. Further, they constitute the greatest resource industry has in helping ensure protection of their workers. To exclude them from qualifying under this bill does a great disservice to the large body of dedicated, independently certified, safety professionals in industry.

E. Advisory Committees

Some of our members are skeptical about Section 4A(d)(1)(A)'s prescription for advisory safety committees — either because they feel this provision would facilitate unionization of non-union shops, or because they feel the right of employee representatives to unilaterally bar the benefits of this provision to employers by refusing, even in bad faith, to participate has potential for grave abuse.

Many employers already have advisory safety committees at their plants and yet fear the intrusion of this provision on their existing programs. Successful existing programs could be rendered unworkable because individual employees or groups may wish to deny employers the benefits of S. 2153.

We believe the obligation of the employer should be to provide the opportunity and the tools for employees to participate in securing a safe and healthful workplace. Nonetheless, this section should be revised to prevent harassment or abuse.

CONCLUSION

The U.S. Chamber reaffirms its support for the objectives of the Occupational Safety and Health Act. Yet OSHA is not working. Government statistics indicate that, despite massive expenditures by industry to comply with OSHA and a growing Federal bureaucracy, the rate of serious injuries and illnesses is increasing.

Nine years of OSHA experience should be sufficient to convince Congress that reform is necessary. During the '70s, we presented our views on OSHA reform to numerous committees of Congress. While there have been several amendments to the Act adopted by Congress as riders to annual Labor-HEW Appropriations bills, there has never been a legislative amendment to the Act reported out of the committees of jurisdiction. Attempts to legislate on appropriations bills demonstrate the frustrations of members of Congress, their constituents, and the business community with the failure of the normal legislative process to face head-on the issue of OSHA reform.

We thank the Chairman and Ranking Minority Member of this Committee for scheduling these hearings, and we commend them and other Committee members for sponsoring OSHA reform legislation. We recognize that they share our objective which is to make OSHA more effective in accomplishing its goal.

The concepts embodied in S. 2153 are a step in the right direction. With the amendments recommended in this statement, we support S. 2153.

The CHAIRMAN. Mr. Wire?

Mr. WIRE. Mr. Chairman and committee members, my name is Ted Wire. I am manager for occupational safety for Deere & Co., located in Moline, Ill.

John Deere manufactures agricultural, industrial, lawn, and garden equipment in 11 manufacturing factories, and distributes this product through 11 part warehousing and distribution facilities in the United States.

Our current U.S. employment is approximately 51,000 employees.

Deere has shown its concern for the safety and health of its employees long before the enactment of the Occupational Safety and Health Act with the implementation of a formal occupational safety program in 1947, and a formal industrial hygiene program in 1948.

We fully support the objective of the Occupational Safety and Health Act of providing employees with a safe and healthful work environment, and have been working hard the past 33 years to accomplish this commendable objective.

We are, however, disappointed with the approach that the U.S. Department of Labor's Occupational Safety and Health Administration has taken in carrying out their mandate under the act.

As confirmed by the Bureau of Labor Statistics report, the number of serious injuries since 1971 in America's workplaces has increased approximately 25 percent. Also, the severity of those industries, measured by total lost work days, is up by more than 34 percent. This is a very dismal record in view of the time, money, and effort that has been spent since the enactment of the act.

Based on our knowledge of what it takes to reduce occupational injury and illnesses, we once again recommend that OSHA initiate a program of identifying where injuries are occurring by specific industry, by analyzing each employer's OSHA 200 Log and Summary of Occupational Injuries and Illnesses, and also the OSHA No. 101 Supplementary Record of Occupational Injuries and Illnesses. We recommended this proven approach to the U.S. Department of Labor's OSHA Administration during the development phase of the foundry national emphasis program. Unfortunately, OSHA has not seen fit to follow this approach.

John Deere followed OSHA's approach of trying to inspect safety into the workplace during the period 1972 through 1974, and we experienced a 42-percent increase in our injury and illness incidence rates. In 1974 we recognized that strictly complying with the OSHA physical standards was not accomplishing our major objective of reducing employee injuries. While maintaining compliance with the OSHA standards, we concentrated our efforts on reducing injuries to our employees by identifying where the injuries were occurring by job classification and also identifying the circumstances that caused these injuries. This factual information enabled us to direct our safety programing efforts to the identified problem areas.

I am pleased to report that from 1975 through February of 1980 Deere's total injury and illness rate—and this is combined OSHA recordable and our first-aid case injuries—was reduced by 74 percent. Serious injuries were reduced 67 percent, and the number of lost workdays away from work was reduced 89 percent.

I believe that this record of significant reductions since 1975 proved that occupational injuries can be substantially reduced with the proven approach of attacking the problems after they have been properly identified. OSHA can adopt this approach administratively, and for the first time assist employers throughout the United States in reducing injuries and illnesses to their employees.

We appreciated the opportunity to comment on the Occupational Safety and Health Administration with the hope that it will lead to a safer America.

If anyone has any questions, I would be pleased to answer them at this time.

The CHAIRMAN. Thank you very much, Mr. Wire. Does that conclude your formal presentation, Bob?

Mr. THOMPSON. Mr. Chairman, I have one last thought or observation that I would like to put into the record. From the testimony that we heard this morning from the Department of Labor and from previous testimony and writings of that agency, I believe that there is a fundamental philosophical disagreement between the Department of Labor and the rest of us.

The basis of this disagreement is an apparent belief on the part of the Department of Labor that employers are insensitive to safety and health hazards, and thus must be forced, through fear of punishment, into compliance with whatever rules the Government prescribes.

It is our firm belief that employers are not insensitive to such hazards, and indeed will respond more strongly and more effectively to a program of recognition and award-reward through relief from harassment. This belief is fortified by the obvious dissatisfaction with the history of unrealistic enforcement and pettiness on the part of the Government.

The real significance of this legislation will be to force a change in the basic thrust of implementation and enforcement of the Occupational Safety and Health Act. We applaud that change.

The CHAIRMAN. Thank you very much, Mr. Thompson. I have some questions I would like to submit, and I think it would be more efficiently done if I submit them in writing for your written response, if you don't mind.

Mr. THOMPSON. We welcome the opportunity, Senator.

The CHAIRMAN. I just would like to make one observation.

I am troubled by your concept of differing exemption criteria for different industries. It seems to me that if we are going to codify criteria here for exemption, it should be by focusing the agency on the most hazardous workplaces, no matter where they are or whether they are in so-called hazardous SIC's or not hazardous industries. In other words, we should be pinpointing to the specific hazardous workplaces rather than your approach of differing criteria for different industries.

Mr. THOMPSON. We recognize, and it did give us some concern, that we are proposing more or less a double tracking system in going both by business and by industry. Our concern is that there are some industries where hazards are simply unavoidable, and there are other industries where there are practically no hazards—and that if you attempted to apply a uniform set of exemptions or standards for exemption, you would in effect remove the incentive or minimize the incentive in the hazardous industries where the incentive seems to us to be needed the most.

What we have attempted, what we have proposed would be a dual system where the incentives hopefully would be maximized in both instances, where you have low-hazard industries and where you have high-hazard industries. I recognize that would take some degree of experimentation. I think it will take more experience than we have had now.

But we are concerned, and I think you are concerned, most with bringing about an improvement in the safety and health conditions at the workplace, and we feel that that is the best way to drive at that goal, by zeroing in not only on overall exemptions or overall standards, but on the industries and the businesses at the same time.

The CHAIRMAN. Well, it would impress me that if we were to use the approach you suggest, and use it as a means of providing an incentive to do better, even in those industries known to be highly hazardous, that approach certainly isn't ready for codification yet. Even with the minimum nature of the exemptions contemplated here, we are still struggling to determine if there is sufficiently reliable data to identify the hazardous workplaces.

And with respect to this, we have learned from the OSHA agency, that they feel that the data base is not reliable for the purpose of the evaluations required by this bill. That, of course, refers to the workers' compensation reporting systems back in the States.

But to go beyond that and to have different criteria for different industries—certainly that data wouldn't be available through the workers' compensation system.

Mr. THOMPSON. I think that data would be available, as we have suggested—that the records which are required by the Occupational Safety and Health Administration simply be submitted to them.

I was impressed by what I think I heard this morning with regard to these workers comp records. I read in the testimony that only two States had the information available. I think I heard that only 1½ States had expressed a willingness to make that available. I think that is quite a distinction there, although we don't advocate that that data be used. I would be astonished if that data did not exist. I can't believe that the States don't maintain that kind of data.

I believe what I heard was that the States are simply not expressing a willingness to make it available to the Federal Government. And I wonder what the basis for that is.

The CHAIRMAN. Well, this suggests some further inquiry on our part to find out just what is available, and what could be available, if this test should be incorporated. That surprised me, too.

Mr. THOMPSON. I think there is a little fine distinction there that the record might reflect, between existence of the data and willingness to submit it on the part of the States.

I think if the chairman would refer to our testimony, we have recommended that another set of records be utilized, and that is a set of records which is required by OSHA today.

The CHAIRMAN. The OSHA 200 logs used to compile the BLS annual survey?

Mr. **Thompson**. It's the 100, I think.

The **Chairman**. And OSHA talked about the monumental paperwork problem presented by that alternative, too. These logs are kept, but only selectively sought by the Bureau of Labor Statistics.

Mr. **Thompson**. They do exist.

The **Chairman**. They do exist, yes.

Mr. **DeBernardo**. In fact, every employer with 11 or more employees is required to post the OSHA form 200.

The **Chairman**. These records are kept and posted.

Mr. **DeBernardo**. Right.

The **Chairman**. But not submitted except on a selective basis.

Mr. **Wire**. Mr. Chairman, if BLS has some doubt about the validity of the information that they are gathering, they could increase their sample size and either prove or disprove that question very easily.

The **Chairman**. I have another meeting with our leadership over in the Senate, so I am going to leave, Dick, and you are going to be here. After this panel is finished, we will recess until 1:45.

Senator **Schweiker**. Thank you, Mr. Chairman. Mr. Thompson, Dr. Bingham said this morning that to give any employer an exemption from inspections and some penalties would make it much less likely that the employer would try to provide a safe workplace.

What is your opinion of that?

Mr. **Thompson**. I think that's hogwash. We had safety programs, we had safety records, long before OSHA was ever even conceived. The statistics would indicate we did a better job of it before OSHA was conceived, which may suggest that repeal would be in order, although I am not advocating that here.

I think you would have to accept the proposition—I think Dr. Bingham would even accept the proposition—that most of the American citizens, which includes businessmen, are law-abiding, and if they know there is a law which applies to them and with which they are required to comply, they are going to attempt to do so. I don't think people pay their taxes or comply with other laws simply because they are afraid somebody is going to come around and put them in jail, or penalize them in some way. I think that is the basic fallacy in the whole concept of this law, which I think you are trying to change. And we applaud you for that effort.

Senator **Schweiker**. Well, I think one other thing that ties in with your statement is, my bill specifically says that where there are willful or repeat violations, OSHA still has a right to impose tough penalties. So the point is for the average guy who wants to obey the law and wants to have a safe place, he has a real incentive to try to do that. Whereas the guy who wants to skirt the law and wants to cheat—and in every operation we always have a few—they are still held accountable.

So this seems to be a reasonable approach to you, I gather.

Mr. **Thompson**. It seems highly reasonable to me, and I think also it should be taken into account that most businessmen, if not all business people, recognize the fact that a good safety record and good safety practices are good business, which is probably the greatest incentive of them all.

Senator **Schweiker**. A very valid point. A lot of areas where you have many different industries, people will select out and work in an industry because of its safe working conditions.

Senator Hatch, do you have some questions?

Senator **Hatch**. Well, first of all, I would like to compliment your work in giving us an awful lot of detail and data that we all believed was available but really haven't had access to. I think you make a compelling case that something needs to be done. And yet I think you have said it in a moderate way that you are not asking for repeal of OSHA, just that we make it a more responsible and more responsive organization.

And that is basically what this bill is all about.

Now, when you talk about $25.3 billion in costs to business over the last 10 years, does that include the indirect costs?

Mr. **Thompson**. No, sir, it does not.

Senator **Hatch**. What would you estimate the indirect costs to be of this intrusion where—let's see, what was it? Such a high percentage of investigations by OSHA really amount to nothing, 73 percent or something like that?

Mr. **Thompson**. I think it was 71 percent, as I recall. I don't know any way you could calculate the actual cost or the indirect cost in terms of interference with the business or harassment to the employer, and how that might reduce his—particularly the small employer—his productivity.

Senator **Hatch**. Well, it's an inflexible approach to correct problems that maybe do not exist or could be corrected in an easier way.

Mr. **Thompson**. I can assure you of this, Senator, for every dollar that has been spent, there's got to be another dollar that was either spent or lost in this program through the investigative process and the harassment that goes with it, and I can assure you of one other thing that I think ought to go into this record. I honestly do not believe that there is a businessman in the United States that thinks the OSHA program is worth a hoot. I have not met one in years who thought the OSHA program as it now exists should be on the books, or should be administered in the way it is being administered, not a single one.

Senator **Hatch**. So even though the chamber has, through you, never met anybody who was for OSHA in the business community, and I haven't met anybody who's for it in the business community, you are still saying you are not necessarily coming in here asking for repeal, but merely to see if you can add some constructive amendments to OSHA.

Mr. **Thompson**. We think that with the basic philosophy of this bill—and that is to change the thrust of OSHA from one of the policeman to a cooperative effort—that some good could come out of it. We think it's worth a try, because we are all interested in the safety and health of the working people of this country.

Senator **Hatch**. Well, all I can say is I am appreciative of your statement, and I am also appreciative of Dr. Bingham's statement. I was very interested that she did not characterize the bill the same as a number of the union leaders that you cited here and that I cited before, but I think she did say that it was something like a loaded pistol, or something, and she indicated that she wouldn't like one change in the present OSHA approach. I know a lot of employees who would like to see changes in the present OSHA approach rather than have it continue on as business as usual and, I agree with you, a hundred percent of the employers who feel that they are being unnecessarily harassed and not necessarily helped in making their business functions more safe for their own employees.

Mr. **Thompson**. I think far more employees appreciate the economics of the business world today than ever before, and I think the statement that was made by Mrs. Bingham that we have got a country out there full of unsophisticated and uneducated workers who—she didn't say this, but she implied it—didn't have sense enough to know when they were working in unsafe conditions is ludicrous.

The one person that I found in all the world that can spot something that is unsafe or unfair or whatever is the worker who is right there with it. I think there's a terrible underestimation on the part of the Government, as exemplified here this morning by Mrs. Bingham, of the intelligence and the sophistication of the American worker. And that may be what's wrong with this program.

Senator **Hatch**. I have heard some of the speeches in this area, and I think you have characterized them correctly, including Mrs. Bingham's, where they seem to be whipping up a disastrous demand against everybody to keep this program going, when in fact—I agree with you—a lot of people realize that they might be safer without this program than with it, because of the animosities that are engendered as a result of the overregulatory approach that OSHA is taking in this particular area.

And I am concerned that we basically do not follow up on employee safety merely because of an overregulatory approach rather than a moderate and reasonable approach that would get businessmen and employees to work together to resolve these conflicts and problems in a better way.

The thing I like about the Schweiker approach, which I have endorsed, is that it is an incentive approach. In other words, we are giving the businessman the incentive to have safe premises rather than presuming they are a bunch of "care-less" employers. And if we give them the incentives, we are likely to wind up with safer workplaces just because of the incentive of avoiding OSHA. Maybe OSHA will have had a very salutary effect under those circumstances, if we can bring it about whereby businesses will—you know, if this bill will come through and pass, whereby businesses will then have the incentive to resolve these difficulties far in advance, just to keep OSHA away. And that alone would perhaps be the major salutary effect of OSHA.

Mr. **Thompson**. With all due respect—and I have a great amount of respect for you, Senator Hatch—I doubt that even you realize the significance of what you just said. [Laughter.]

Senator **Hatch**. Well, I take that chastisement in order.

Mr. **Thompson**. I'm not chastizing; I don't believe that anyone could plumb the depths of that feeling on the part of American business people.

Senator **Hatch**. I think that's true. And I will try to plumb the depths of what I have just said, and even the heights of what I have just said. I think it's true. Thank you so much.

Mr. **Thompson**. If I could add one point which I think is also of great significance in this effort by Senator Schweiker and the committee, I think the fact that the Department of Labor has come in here on at least two occasions, and probably more, and taken the position that you should not put these things into the statute, you should leave them to us to experiment and develop regulations concerning these things, is proof positive that you need to put some of these things in this statute, you need to put some of these things in other statutes, so we avoid this overregulation of our society and this experimentation with our system. I think Congress, as the elected representatives of the people of this country, and that includes the business people, should have sense enough—and I believe it does have sense enough—to spell out a few of these things without having to depend on this huge bureaucracy that overflowed this room this morning to tell you that you didn't have that much sense, that they ought to be allowed to continue what is obviously a record of failure.

Senator **Hatch**. Mr. Thompson—excuse me, Senator Schweiker, if I could ask one more question—I was particularly intrigued by one of the arguments that Mrs. Bingham gave in her remarks this morning, which basically says that formal exemptions are unwise public policy. In fact, the bills before you would create two classes of workers; one entitled to full protection under the law, and the other relegated to second-class status. Now, that's logical assertion No. 1.

No. 2, to make such a distinction on the basis of past safety records of industries and individual firms is particularly unsupportable.

No. 3, the fact that an airplane did not crash last year is not sufficient reason to exempt it from Federal aviation safety surveillance, and she applies the same thing to a driver who hasn't had a traffic fine or an accident.

What do you think about those bits of logic?

Mr. **Thompson**. Well, I think the first two are just sort of jingoistic. The second-class citizen is a favorite argument of those kind of people when they can't think of anything else to argue against an exemption. But I think to go to the basic point of it, you go back to the proposition that the law still applies, that if you have people who are repeat violators, employers who are repeat violators, there is the provision that will bring them back under it. There is simply no way that you can characterize this as having second-class workers. I think more appropriately you could say that you have workers who by identification are working in safer places—those are the second-class people she is talking about, because of the record that has been established.

I don't know of a better way to identify areas when you can't inspect every area, to identify areas to allow a period of time to go by and let them prove a record than those who have already proven themselves to be safety conscious and proven a safety record. That's what I understand this bill to be attempting to do.

Senator **Hatch**. I submit that if we wanted to solve every one of the potential hazardous problems, say, for automobile drivers, we might let them all drive XM-1 tanks—maybe that's the answer. And the same thing may apply in business. There are reasonable factors that you have to take into consideration, no matter which side of this issue you are on.

And I appreciate the fact that at least you are trying to come in with a more moderate statement.

Mr. **Thompson**. Thank you.

Senator **Hatch**. Thank you.

Senator **Schweiker**. Thank you, Senator Hatch. I just want to pursue one point a minute that was talked about—polarization. Obviously one of my original intentions was to depolarize the OSHA debate. I obviously didn't succeed.

But we had some testimony earlier about litigation, which I think is one indication of this polarization. In 1973 there were 5,700 contested violations, in 1976, 22,323, and in fiscal year 1979 there were 27,086. This shows a tremendous increase in contested violations. That's a very good prima facie case of a lot of frustration and dissatisfaction, regardless of whose fault the litigation is. The point is the system isn't working in two respects: people feel they haven't been given a fair shake, so they contest it; and, second, the worker doesn't get his problem answered right away because it has to be in litigation.

So I think there is prima facie evidence of the kind of polarization that has set in. In response to Dr. Bingham's question about how things might get worse, I don't know how much worse they can get when you jump from 5,000 to 22,000 to 27,000 litigations. That certainly shows that the system isn't working.

Mr. **Thompson**. I think what those figures demonstrate on the basis of my own experience as a practicing lawyer is that more and more employers have decided that this program really is not driving at safety and health, but is driving at citations and punitive measures against them, and they have decided to stand up and fight.

When this program first went into effect 9 years ago, most employers embraced it as something that at least they would give a chance to prove itself as good, something that would be worthwhile for everyone. As the Government has demonstrated, the policeman's role and the citation route, more and more businessmen and employers have seen fit, have seen it necessary to resist rather than to try to work with the Government, because they couldn't find anybody in the Government that they could work with.

The polarization I think has perhaps been misinterpreted. I do not believe the polarization in this field is between labor and management or between worker and management. I think the polarization is between workers and management, on the one hand, and the Government on the other hand. The Government supposedly is out there looking after the health and safety of the workers, has put itself in a position where both workers and employers look on the Government almost as the enemy in this field, which is an awful situation to have develop in a field that is so important.

And that is the reason we feel the change of thrust which you are attempting to bring about in the administration of this law is so important. We must get away from that kind of polarization if we are going to accomplish anything through a Government program on safety and health.

Mr. DEBERNARDO. I think another important distinction is the distinction between organized labor and labor in general. I agree with Mr. Thompson that workers, employees and employers alike, very often are dissatisfied and frustrated with OSHA, and I think the distinction should be made that organized labor doesn't necessarily represent the views of all workers, particularly since they have been so vocal and, as we have indicated in our testimony, uncooperative in efforts toward OSHA reform.

Senator SCHWEIKER. All right, Senator Williams has announced, because we are running so late, we will recess our hearings of the Labor and Human Resources Committee until 1:45, at which time we will resume with our witnesses for the day.

[The committee recessed.]

The CHAIRMAN. We now invite the first full panel, George Robinson, William H. McClennan, and Stanley Eller. Now, President McClennan, you are the ranking member here on this panel, are you not? Why don't we start with you?

STATEMENTS OF WILLIAM H. McCLENNAN, PRESIDENT, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, CLC, WASHINGTON, D.C.; GEORGE ROBINSON, DIRECTOR, OCCUPATIONAL SAFETY AND HEALTH, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, WASHINGTON, D.C.; AND STANLEY ELLER; SAFETY AND HEALTH DIRECTOR, INTERNATIONAL CHEMICAL WORKERS UNION, WASHINGTON, D.C.

Mr. MCCLENNAN. Thank you, Mr. Chairman. Mr. Chairman, members of the committee, my name is William H. McClennan and I am president of the International Association of Fire Fighters, AFL-CIO, CLC, which represents approximately 165,000 paid professional fire service employees throughout the country. In addition, I serve as president of the Public Employee Department of the AFL-CIO, representing over 2 million public employees. I am also a vice president of the AFL-CIO, where I serve as a member of its executive council and chair its standing Committee on Occupational Safety and Health. I and my colleagues, Mike Smith, IAFF director of research, Rich Duffy, IAFF occupational safety and health coordinator, and Tom Herz, IAFF burn coordinator, appear before the committee this morning to express our vigorous opposition to S. 2153, S. 1486, and S. 1572. My statements are on behalf of this country's firefighters, public employees, and for all working men and women so that they and their families will not have to suffer the agony of job-related deaths, injuries, and illnesses.

As this committee is well aware, organized labor fought long and hard to get the Occupational Safety and Health Act promulgated. Since its inception, our concept of the act was it should apply to every working man and woman. Unfortunately, many of this Nation's workers were excluded, such as our public employees who are not afforded the safety and health protection as their counterparts in the private sector. Today, we are now facing a further reduction in worker protection through the Senate bills that are before us. By exempting certain employers, based on the criteria set forth by Senators Schweiker, Church, and Helms in their respective bills, we are regressing to the voluntary compliance days that preceded the enactment of OSHA.

As chairman of the AFL-CIO standing Committee on Occupational Safety and Health, I ask that this committee listen carefully to my colleagues' testimonies during these hearings. Testimony that will describe how the workers whom they represent will be affected by a reduction in OSHA enforcement. Testimony that will point to a need for OSHA to remain a preventive agency and not one that can only react after a worker is seriously injured or killed at his or her workplace. And testimony that will show that the plain fact of the matter is that in many cases management will simply not comply to safety and health standards unless there is enforcement. I would hope that at the conclusion of these hearings this committee will agree that there is a need to strengthen the ability of all workers to act as auxiliary to enforcement of both safety and health standards. Then, through their collective bargaining agreements, they can attempt to clean up their particular workplace. However, when these attempts fail, as often happens, or if there are no bargaining rights, as in the case of many public employees, strong and nonrestrictive provisions as are contained within the OSH Act are needed. I ask that this committee not take this away.

The plight of this Nation's firefighters, as one of this country's most hazardous occupations, may be seriously affected by a reduction in OSHA enforcement. While our firefighters, excluding those that we represent in the private sector, are excluded from Federal OSHA, they are required to be covered by at least as effective safety and health provisions in the 24 States where there is an approved OSHA plan. Unfortunately, only a handful of States, such as California and Washington, have specific State safety and health standards for firefighters. However, with the promulgation of the OSHA fire brigade standard—1910.134—which should occur in the next few weeks, we will be taking a giant step forward in protecting our firefighters. This safety standard will not only regulate industrial fire brigades, but also those fire departments, whether State, county, or municipal, in a State where an OSHA State plan agreement is in effect. As required by section 18 of the OSH Act, a State must provide satisfactory assurance that it will establish and maintain an effective and comprehensive occupational safety and health program for all public employees, as effective as that contained in the approved State plan covering private employees. After almost 8 years of effort by the International Association of Fire Fighters in getting OSH Administration to understand the seriousness of the occupational hazards involved in firefighting, we are fearful that our work will be nullified by the OSHA enforcement reduction bills before us.

We believe that many of our departments will be exempted from enforcement of safety provisions of State standards for firefighters because the department was fortunate enough, by luck, to have neither a death nor more than an approximate rate of 2 per 100 firefighter-lost-workday injuries or, in the case of our many small fire departments, excluded because they have attained small business status.

The seriousness of these exemptions can be further clarified by a few examples. Our international has for a number of years been working on standards for personal protective equipment such as firefighters turnout gear and respiratory equipment. Our efforts, in part, have brought about better equipment for all firefighters. However, getting our cities to procure this equipment has been another battle. In these days of budget cutting and tightening purse strings and with the absence of mandated and enforced requirements, many of the public employers have put off the purchase of personal protective equipment for firefighters. Tom Herz, the international's burn coordinator, has suffered the unfortunate fate of being caught in a fire while wearing inadequately designed equipment. I would like to let Tom briefly describe his accident and the lack of protection his equipment afforded him.

The CHAIRMAN. Fine.

Mr. HERZ. Mr. Chairman, it is obvious that we are not pleading the case that firefighting is a dangerous occupation; we feel that that is quite obvious. But the other thing that we feel is also obvious is the inadequacy of some of our equipment.

If you will allow me, sir, in 1970 I was a member of a company in Baltimore City, and I responded to a fire wearing this equipment. [Witness shows equipment.]

Mr. HERZ. This, I may have to explain, is a helmet, the helmet that I was wearing that day in 1970. Also, this here was a protective coat that I was wearing that same day. The resulting injury from having this equipment on that day required me to be hospitalized for 8½ months as a result of sustaining burns over 75 percent of my body. We accept the fact that this is a dangerous job and that there are risks.

We also understand, too, that in 1970 this equipment may possibly have been the best that my city might have been able to provide at that time. What we are terribly disturbed about and what we happen to think is an indication that management does not voluntarily provide the best kind of protective equipment is the fact that there are tens of thousands of firefighters, and there is no doubt in my mind some in your own home State, Mr. Chairman, that are still wearing this identical coat and helmet today, 10 years later, knowing full well what could possibly happen.

We realize that my kind of injury is not a discriminating one, that it makes no difference what size fire department you have, whether it be 5 men or 5,000 men. It makes no difference where you are. This kind of injury is not based upon whether you have had one in the past; it is always looming out there in the future. Consequently, firefighters most certainly require and should be afforded the best possible protection they can possibly have.

I thank you for your time, sir.

Mr. McCLENNAN. After the promulgation of the OSHA fire brigade standard and its inclusion in approved State plans, we will fortunately have fire fighters protected through the stringent protective clothing and equipment provisions in 24 States. However, firefighters working for departments that achieve exemptions from safety enforcement, would potentially not be protected due to reasons previously cited—S. 2153, section 4(i)(4).

Another area that this committee should look carefully at is the problem of determining what standards are safety and what are health. Standards that firefighters greatly depend on are those that deal with respiratory protection. Under OSHA, these standards fall into the safety category, even though the prescribed equipment and programs protect workers' health. The final determination must unfortunately be made through years of litigation. I certainly believe that the Government resources can be better applied by continuing worker protection through enforcement, regardless of which category enforcement falls under. We recently won an OSHA citation for one of our private sector fire departments in New York City. These firefighters are employed by the New York Board of Fire Underwriters, an insurance establishment, and their function is to preserve life and property at fires and other insured perils. Because of unknown atmospheres at all fire scenes and because of the possible susceptibility to smoke inhalation, the firefighters requested that management purchase adequate self-contained breathing apparatus for their use. Not progressing anywhere with their request, the local submitted a formal request for an OSHA inspection. During the inspection, the employer stated that there was no reason for self-contained breathing apparatus to be worn, but they would attempt to procure some such equipment. Hence, they did not receive an OSHA citation. Not satisfied, the local asked the international to intervene. By our requesting a conference and an additional safety inspection, especially in light of a number of smoke inhalation cases after the original inspection, the company was cited and mandated to provide respiratory protection for these firefighters. If this employer met the exemptions of these Senate bills, the firefighters would not be afforded such recourse and their health would continue to be inadequately protected. This would basically happen because respiratory protection falls under safety provisions of the OSH Act.

The maintenance of respiratory equipment would also fall under the safety provisions and the enforcement of these standards would also be in jeopardy. A year ago we lost three firefighters in Lubbock, Tex. These firefighters were not fighting a fire, but searching for fire extension in a room adjacent to the actual fire scene. Respiratory protection equipment was worn, but because of the condition of this equipment, primarily due to lack of maintenance and faulty engineering design, these firefighters, who believed that their breathing apparatus would protect them, died. The lack of continued Government enforcement of such standards would not only affect firefighters, but all workers that are required to wear respiratory protective equipment.

Mr. Chairman, we have certainly appreciated the opportunity to testify this afternoon. The International Association of Fire Fighters will continue its struggle for better health and safety standards for firefighters. We will work in those States with approved OSHA plans to assure that new Federal standards, or those that are at least as effective, are placed into effect. Our international union will also strive to get public employee only State plans, such as we are now doing in New York, in these 26 States without any provi-

sions for firefighters' safety and health. We also hope that through our efforts, that some day all firefighters will be covered under the provisions of the Occupational Safety and Health Act. We ask this committee today to not take away the little we already have. Thank you, Mr. Chairman.

[The prepared statement of Mr. McClennan follows:]

TESTIMONY
BEFORE THE
UNITED STATES SENATE
COMMITTEE ON LABOR AND HUMAN RESOURCES
ON
S. 2153, S. 1486, and S. 1572

BY

WILLIAM H. McCLENNAN, PRESIDENT

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, CLC

Mr. Chairman, members of the Committee: My name is William H. McClennan and I am President of the International Association of Fire Fighters, AFL-CIO, CLC, which represents approximately 165,000 paid professional fire service employees throughout the country. In addition, I serve as President of the Public Employee Department of the AFL-CIO, representing over 2 million public employees. I am also a Vice President of the AFL-CIO where I serve as a member of its Executive Council and Chair its Standing Committee on Occupational Safety and Health. I and my colleagues, Mike Smith, IAFF Director of Research; Rich Duffy, IAFF Occupational Health and Safety Coordinator; and Tom Herz, IAFF Burn Coordinator appear before the Committee this morning to express our vigorous opposition to S.2153, S. 1486, and S. 1572. My statements are on behalf of this country's fire fighters, public employees, and for all working men and women so that they and their families will not have to suffer the agony of job-related deaths, injuries and illnesses.

As this Committee is well aware organized labor fought long and hard to get the Occupational Safety and Health Act promulgated. Since its inception, our concept of the Act was it should apply to every working man and woman. Unfortunately, many of this nation's workers were excluded, such as our public employees who are not afforded the safety and health protection as their counterparts in the private sector. Today, we are now facing a further reduction in worker protection through the Senate Bills that are before us. By exempting certain employers, based on the criteria set forth by Senators Schweiker, Church, and Helms in their respective bills, we are regressing to the voluntary compliance days that preceded the enactment of OSHA.

As Chairman of the AFL-CIO Standing Committee on Occupational Safety and Health, I ask that this Committee listen carefully to my colleagues' testimonies during these hearings. Testimony that will describe how the workers whom they represent will be affected by a reduction in OSHA enforcement. Testimony that will point to a need for OSHA to remain a preventative agency and not one that can only react after a worker is seriously injured or killed at his or her workplace. And testimony that will show that the plain fact of the matter is that in many cases management will simply not comply to safety and health standards unless there is enforcement. I would hope that at the conclusion of these hearings this Committee will agree that there is a need to strengthen the ability of all workers to act as auxiliary to enforcement of both safety and health standards. Then, through their collective bargaining agreements they can attempt to clean up their particular workplace. However, when these attempts fail, as often happens, or if there are no bargaining rights, as in the case of many public employees, strong and non-restrictive provisions as are contained within the OSHAct are needed. I ask that this Committee not take this away.

The plight of this nation's fire fighters, as one of this country's most hazardous occupations may be seriously affected by a reduction in OSHA enforcement. While our fire fighters, excluding those that we represent in the private sector, are excluded from Federal OSHA, they are required to be covered by at least as effective safety and health provisions in the twenty-four (24) states where there is an approved OSHA Plan. Unfortunately only a handful of states, such as California and Washington, have specific state safety and health standards for fire fighters. However, with the promulgation of the OSHA Fire Brigade Standard (1910.134) which should occur in the next few weeks, we will be taking a giant step forward in protecting our fire fighters. This safety standard will not only regulate industrial fire brigades, but also those fire departments, whether state, county, or municipal, in a state where an OSHA State Plan agreement is in effect. As required by Section 18 of the OSHAct, a state must provide satisfactory assurance that it will establish and maintain an effective and comprehensive occupational safety and health program for all public employees, as effective as that contained in the approved State Plan covering private employees. After almost eight years of effort by the International Association of Fire Fighters in getting OSHAdministration to understand the seriousness of the occupational hazards involved in fire fighting, we are fearful that our work will be nullified by the OSHA enforcement reduction Bills before us.

We believe that many of our departments will be exempted from enforcement of safety provisions of State standards for fire fighters because the department was fortunate enough, by luck, to have neither a death nor more than an approximate rate of 2 per 100 fire fighter-lost-workday injuries or in the case of our many small fire departments excluded because they have attained "small business" status.

The seriousness of these exemptions can be further clarified by a few examples. Our International has for a number of years been working on standards for personal protective equipment such as fire fighters turnout gear and respiratory equipment. Our efforts, in part, have brought about better equipment for all fire fighters. However, getting our cities to procure this equipment has been another battle. In these days of budget cutting and tightening purse strings and with the absence of mandated and enforced requirements, many of the public employers have put off the purchase of personal protective equipment for fire fighters. Tom Herz, the International's Burn Coordinator, has suffered the unfortunate fate of being caught in a fire while wearing inadequately designed equipment. I would like to let Tom briefly describe his accident and the lack of protection his equipment afforded him (See Attachment A).

After the promulgation of the OSHA Fire Brigade Standard and its inclusion in approved State Plans, we will fortunately have fire fighters protected through the stringent protective clothing and equipment provisions in twenty-four (24) states. However, fire fighters working for departments that achieve exemptions from safety enforcement, would potentially not be protected due to reasons previously cited (S.2153 Section 4 (i)(4)).

Another area that this Committee should look carefully at is the problem of determining what standards are safety and what are health. Standards that fire fighters greatly depend on are those that deal with respiratory protection. Under OSHA, these standards fall into the safety category, even though the prescribed equipment and programs protect workers' health. The final determination must unfortunately be made through years of litigation. I certainly believe that the government resources can be better applied by continuing worker protection through enforcement, regardless of which category enforcement falls under. We recently won an OSHA citation for one of our private sector fire departments in New York City. These fire fighters are employed by the New York Board of Fire Underwriters, an insurance establishment, and their function is to preserve life and property at fires and other insured perils. Because of unknown atmospheres at all fire scenes and because of the possible susceptibility to smoke inhalation, the fire fighters requested that management purchase adequate Self-Contained Breathing Apparatus for their use. Not progressing anywhere with their request, the Local submitted a formal request for an OSHA inspection. During the inspection, the employer stated that there was no reason for Self-Contained Breathing Apparatus to be worn, but they would attempt to procure some such equipment. Hence, they did not receive an OSHA citation. Not satisfied, the Local asked the International to intervene. By our requesting a conference and an additional safety inspection, especially in light of a number of smoke inhalation cases after the original inspection, the company was cited and mandated to provide respiratory protection for these fire fighters. If this employer met the exemptions of these Senate Bills, the fire fighters would not be afforded such recourse and their health would continue to be inadequately protected. This would basically happen because respiratory protection falls under safety provisions of the OSHAct (See Attachment B).

The maintenance of respiratory equipment would also fall under the safety provisions and the enforcement of these standards would also be in jeopardy. A year ago we lost three fire fighters in Lubbock, Texas. These fire fighters were not fighting a fire, but searching for fire extension in a room adjacent to the actual fire scene. Respiratory protection equipment was worn, but because of the condition of this equipment, primarily due to lack of maintenance and faulty engineering design, these fire fighters, who believed that their breathing apparatus would protect them, died (See Attachment C). The lack of continued government enforcement of such standards would not only affect fire fighters, but all workers that are required to wear respiratory protective equipment.

Mr. Chairman, we have certainly appreciated the opportunity to testify this morning. The International Association of Fire Fighters will continue its struggle for better health and safety standards for fire fighters. We will work in those states with approved OSHA plans to assure that new Federal standards, or those that are at least as

effective, are placed into effect. Our International Union will also strive to get Public Employee only State Plans, such as we are now doing in New York, in these twenty-six (26) states without any provisions for fire fighters' safety and health. We also hope that through our efforts, that some day all fire fighters will be covered under the provisions of the Occupational Safety and Health Act. We ask this Committee today to not take away the little we already have. Thank you.

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Attachment A

Testimony of Thomas Herz

Burn Coordinator, IAFF

We are not here to plead the case that fire fighting is a dangerous occupation, that should be obvious. It should also be obvious that this equipment, which I wore while attempting to extinguish a fire in a home in a residential area in 1970, does not provide adequate protection. A contradiction to the obvious inadequacy of this equipment is the fact that, this identical equipment is still being worn by tens-of-thousands of fire fighters in this country today. This is also truly an indicator that management does not voluntarily provide adequate personal protective equipment. Knowing full well that an injury such as mine is non-discriminating as to the size of a fire department, its geographic area or the past injury history of that department, I urge you not to allow any reduction in the enforcement of the OSHA standards or standards at least as effective in the area of safety. Finally, please be mindful that severe burn injuries, and all of their accompanying complications, resulting from inadequate equipment are not solely restricted to our occupation.

Attachment B

New York Board of Fire Underwriters

OSHA Citation

U. S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
90 CHURCH STREET
NEW YORK, NEW YORK 10007

April 10, 1979

The New York Board of Fire Underwriters
85 John Street
New York, NY 10038

RE: B4776-788

Dear Sir/Madam:

This is to advise you that we have investigated your complaint. The items mentioned in your complaint were found not to be in violation of the Occupational Safety and Health Standards. Consequently, no citations were issued.

You have the right to request a review of this determination by following the procedures in 29 CFR 1903.12(a), a copy of which is attached.

We thank you for your interest in Safety and Health, and invite you to contact this office if you have any further questions.

Nicholas A. Di Archangel
Area Director
New York Area Office

Form Letter #3

1903.12—INSPECTION NOT WARRANTED; INFORMAL REVIEW

(e) If the Area Director determines that an inspection is not warranted because there are no reasonable grounds to believe that a violation or danger exists with respect to a complaint under § 1903.11, he shall notify the complaining party in writing of such determination. The complaining party may obtain review of such determination by submitting a written statement of position with the Regional Administrator and, at the same time, providing the employer with a copy of such statement by certified mail. The employer may submit an opposing written statement of position with the Regional Administrator and, at the same time, provide the complaining party with a copy of such statement by certified mail. Upon the request of the complaining party or the employer, the Regional Administrator, at his discretion, may hold an informal conference in which the complaining party and the employer may orally present their views. After considering all written and oral views presented, the Regional Administrator shall affirm, modify, or reverse the determination of the Area Director and furnish the complaining party and the employer and written notification of his decision and the reasons therefor. The decision of the Regional Administrator shall be final and not subject to further review.

U. S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
80 CHURCH STREET
NEW YORK, NEW YORK 10007

August 24, 1979

Mr. Richard M. Duffy
International Association of Fire Fighters
1750 New York Ave. N.W.
Washington, D.C. 20006

Dear Sir/Madam:

This is to advise you that we have investigated your complaint.

The items mentioned in your complaint were found to be in violation of OSHA Safety/Health Standards and citations were issued.

Copies of the citations are included for your information.

We thank you for your interest in Safety/Health, and invite you to contact this office if you have any further questions.

Sincerely yours,

Nicholas A. Di Archangel
Area Director
New York Area Office

RECEIVED
AUG 31 1979
RESEARCH
INT'L ASSN. OF FIRE FIGHTERS

Form Letter #1

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS
1750 NEW YORK AVENUE, N.W., WASHINGTON, D.C. 20006
TELEPHONE NO. (202) 872-8484

William H. McClennan
President

Frank A. Palumbo
Secretary-Treasurer

R

July 30, 1979

CERTIFIED MAIL

Mr. Alfred Barden
Regional Administrator
Occupational Safety and Health
  Administration
U.S. Department of Labor
1515 Broadway (1 Astor Plaza) #3445
New York, NY   10036

Dear Mr. Barden:

In order to protect the health of their members, the principal officers of Local I-26, International Association of Fire Fighters, AFL-CIO,CLC requested that the New York Board of Fire Underwriters provide their employees with the necessary respiratory protection equipment. After refusal by the employer, the officers requested an OSHA inspection stating that the employer failed to meet the requirements set forth in 29 CFR 1910.134. After a limited investigation by the Manhattan Area Office, the Compliance Safety and Health Officer found that the items mentionad in I-26's complaint "were found not to be in violation of the Occupational Safety and Health Standards." Based on the unknown levels of toxic substances to which the members of this local are potentially exposed, which differ both quantitatively and qualitatively from fire emergency to fire emergency, I wish to appeal this decision.

Therefore, on behalf of the members of the International Association of Fire Fighters, Local I-26, I wish to exercise my rights granted under 29 CFR 1910.12 (a) and obtain a review of the April 10, 1979 determination of Area Director Nicholas A. DiArchangel on OSHA Employee Complaint Number B4776-788.

At the time of the informal hearing the principal officers of Local I-26 and myself will be prepared to discuss why self-contained breathing apparatus (which are required to be used in oxygen-deficient or toxic atmospheres, i.e. those immediately dangerous to life or health) should be provided by the employer. I would also expect OSHA to set forth the parameters and rationale on which it based this decision.

Mr. Alfred Barden

July 30, 1979
Page Two

In closing, I hope OSHA will act expeditiously on this request, especially since these employees are still working on a day to day basis in unknown and potentially toxic environments. In fact, shortly after OSHA made this determination three members of local I-26 suffered smoke inhalation and were hospitalized, during the Macy's fire in New York City. These occupational injuries would have been prevented if appropriate respiratory equipment was available.

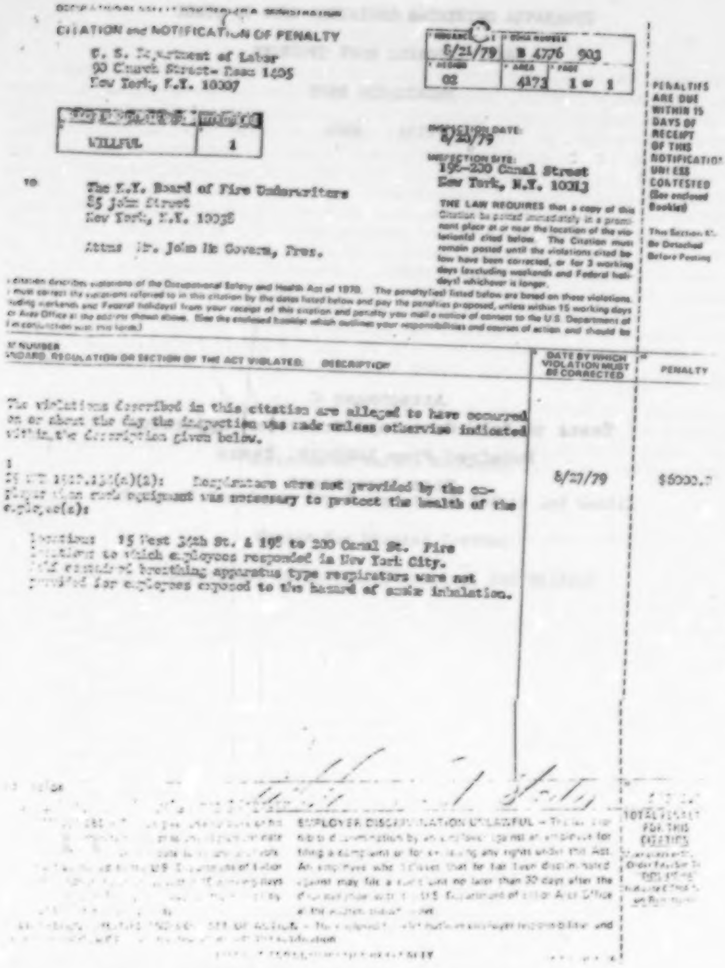
As an employee representative of members of the International Association of Fire Fighters, I expect all correspondence to be directed to myself as well as Edward Overton, Vice President, Local I-26, IAFF, AFL-CIO, CLC, 783 Davis Avenue, Uniondale, New York 11553. As per regulation 1903.12 (a) a copy of this letter has been forwarded via certified mail to the New York Board of Fire Underwriters.

Sincerely,

Richard M. Duffy
Occupational Health and Safety
Coordinator

RMD:mjm

cc: W.H. McClennan, President, IAFF
Richard J. Vizzini, V.P. IAFF 1st Dist.
Edward Overton, V.P., I-26
Bob Gollnick, Pres., New York State Assn.
Ed Hickey, General Counsel
Tom Seymour, OSHA, Office of Civil
Fire Protection and Engineering
Joseph Velasquez, OSHA, Special Assistant for
Labor Liaison
New York Board of Fire Underwriters - CERTIFIED,
RETURN RECEIPT REQUESTED



OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

CITATION and NOTIFICATION OF PENALTY

U. S. Department of Labor
90 Church Street- Room 1405
New York, N.Y. 10007

ISSUANCE	CSHO NUMBER	
8/21/79	B 4776 903	
REGION	AREA	PAGE
02	4173	1 of 1

TYPE OF VIOLATION(S)	NUMBER
WILLFUL	1

INSPECTION DATE:
8/20/79

INSPECTION SITE:
196-200 Canal Street
New York, N.Y. 10013

TO

The N.Y. Board of Fire Underwriters
85 John Street
New York, N.Y. 10038

Attn: Mr. John Mc Govern, Pres.

THE LAW REQUIRES that a copy of this Citation be posted immediately in a prominent place at or near the location of the violation(s) cited below. The Citation must remain posted until the violations cited below have been corrected, or for 3 working days (excluding weekends and Federal holidays) whichever is longer.

PENALTIES ARE DUE WITHIN 15 DAYS OF RECEIPT OF THIS NOTIFICATION UNLESS CONTESTED (See enclosed Booklet)

This Section May Be Detached Before Posting

citation describes violations of the Occupational Safety and Health Act of 1970. The penalty(ies) listed below are based on these violations. must correct the violations referred to in this citation by the dates listed below and pay the penalties proposed, unless within 15 working days uding weekends and Federal holidays) from your receipt of this citation and penalty you mail a notice of contest to the U.S. Department of or Area Office at the address shown above. (See the enclosed booklet which outlines your responsibilities and courses of action and should be l in conjunction with this form.)

M NUMBER NDARD, REGULATION OR SECTION OF THE ACT VIOLATED: DESCRIPTION	DATE BY WHICH VIOLATION MUST BE CORRECTED	PENALTY
The violations described in this citation are alleged to have occurred on or about the day the inspection was made unless otherwise indicated within the description given below.		
1 29 CFR 1910.134(a)(2): Respirators were not provided by the employer when such equipment was necessary to protect the health of the employee(s): Locations: 15 West 34th St. & 196 to 200 Canal St. Fire situations to which employees responded in New York City. Self contained breathing apparatus type respirators were not provided for employees exposed to the hazard of smoke inhalation.	8/27/79	$5000.00

EMPLOYER DISCRIMINATION UNLAWFUL — The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he has been discriminated against may file a complaint no later than 30 days after the discrimination with the U.S. Department of Labor Area Office at the address shown above.

TOTAL PENALTY FOR THIS CITATION

Attachment C
Tests of Self-Contained Breathing Apparatus Received From Lubbock, Texas Fire Department

TESTS OF SELF CONTAINED BREATHING APPARATUS

RECEIVED FROM LUBBOCK, TEXAS

FIRE DEPARTMENT

JUNE 1979

Division of Safety Research

National Institute for Occupational Safety and Health

Center for Disease Control

Department of Health, Education, and Welfare

SUMMARY

The National Institute for Occupational Safety and Health (NIOSH) tested three Scott self-contained breathing apparatus (models II and IIA Air-Paks and Presur-Paks) and a regulator from a fourth Scott self-contained breathing apparatus, to determine their Bureau of Mines (BOM) or Mine Safety and Health Administration (MSHA)/NIOSH approval status. These apparatus and the regulator were sent to NIOSH at Morgantown, West Virginia, by Chief Foster of the Lubbock, Texas Fire Department. The apparatus were identified as having been worn at a fire scene by three fire fighters who died at that fire scene on March 25, 1979. The regulator was taken from an inservice piece of fire apparatus which may not have been on the fire scene. NIOSH examined the apparatus and regulator, as received, and found that critical parts were missing, damaged, and/or defective. The apparatus and regulator were tested and failed to meet several applicable requirements of BOM and MSHA/NIOSH respirator approval regulations (Title 30 Code of Federal Regulations: BOM Schedule 13E and MSHA/NIOSH Part 11).

The apparatus as received by NIOSH were considered to be in an unapproved condition. In each case, several repairs, replacements, and/or adjustments would be required to meet the applicable conditions of BOM or MSHA/NIOSH approval.

INTRODUCTION

Three Lubbock, Texas, fire fighters died at a fire scene on March 25, 1979. These fire fighters were equipped with Scott Model II and IIA Air-Pak and Presur-Pak self-contained breathing apparatus, approved by the Bureau of Mines (BOM) or by the Mine Safety and Health Administration (MSHA)/National Institute for Occupational Safety and Health (NIOSH). Chief Foster of the Lubbock, Texas, Fire Department asked NIOSH, on April 13, 1979, to examine and test the subject apparatus. The apparatus were received by NIOSH on April 23 and April 24, 1979, together with the separate regulator. They were tested for conformance with applicable BOM and MSHA/NIOSH respirator approval requirements.

DESCRIPTION OF APPARATUS

The apparatus and regulator consisted of the following assemblies (identified by NIOSH assigned numbers):

NIOSH Assigned Number	Description
1	This apparatus assembly bore a TC-13F-39 MSHA/NIOSH approval label on the backplate/harness subassembly. It was also equipped with a P/N 800212-00 pressure-demand regulator (S/N 57-10 1183), a cylinder (72621 BV HT 2-54, 1-63, 9-73 3AA-1800/ stenciled "LUBBOCK FD") and valve subassembly, and a facepiece (BM 13-E-08).
2	This apparatus assembly bore a TC-13F-40 MSHA/NIOSH approval label on the backplate/harness subassembly and was marked "47". It was also equipped with a P/N 800212-00 pressure-demand regulator (S/N 87-30 0658/marked "47"), a cylinder (T79535 HT 2-76 SP 6498 2216/ stenciled "LFD" and "LUBBOCK FIRE DEPT" and valve subassembly, and a facepiece (1Q78/ marked "47").
3	This apparatus assembly bore a BM-13E-08 BOM-approval label on the backplate/harness subassembly (stenciled "LFD"). It was also equipped with a demand regulator (S/N 55201 marked BM-13E-08), a cylinder (35641 DF HT 7-68+ 3AA 2015/ stenciled "LFD") and valve subassembly, and a facepiece (BM-13E-08/ stenciled "LFD" and marked "21").
4	This regulator subassembly consisted of a P/N 800212-00 pressure-demand regulator (S/N 47-21 0663) with diaphragm in place. This

regulator may be part of the MSHA/NIOSH TC-13F-40 approved assembly. A separate regulator diaphragm was in an envelope enclosed in the bag with the separate regulator.

Each of the above apparatus assemblies 1, 2, and 3 were found upon examination to differ from the applicable BOM and MSHA/NIOSH approved assembly in one or more aspects. The variations from approved status are detailed in Table 1.

In addition, each of the apparatus assemblies and regulator subassembly were found upon examination to have missing, damaged, and/or defective parts when compared with BOM and MSHA/NIOSH record material. These discrepancies and defects and other observations concerning the apparatus and subassembly are detailed in Table 2.

In summary, the three apparatus were expected to be demand and pressure-demand units of types approved by the Bureau of Mines and the Mine Safety and Health Administration/National Institute for Occupational Safety and Health. The apparatus identified by NISOH Number 1 bore a MSHA/NIOSH TC-13F-39 approval label. This approval was issued for a demand-type 30 minute compressed-air self-contained breathing apparatus. NIOSH Number 1 apparatus, however, was equipped with a pressure-demand instead of a regular demand regulator and a pressure demand instead of a regular demand facepiece. It also had a low capacity cylinder (1800 psig/40 cubic feet) instead of the higher capacity cylinder (2216 psig/45 cubic feet) approved for use with the TC-13F-39 apparatus.

The apparatus identified by NIOSH Number 2 bore a MSHA/NIOSH TC-13F-40 approval label. This approval was issued for a pressure-demand type 30-minute compressed-air self-contained breathing apparatus. The apparatus identified by NIOSH Number 3 bore a BOM BM-13E-08 approval label. This approval was issued for both a demand type and a pressure demand type 30-minute compressed-air self-contained breathing apparatus. Except for variations in subassembly markings, both NIOSH Number 2 apparatus and NIOSH Number 3 apparatus were assembled with the correct subassemblies. The variations listed in Table 1 and the discrepancies and defects listed in Table 2 were cause for a NIOSH decision that none of the apparatus, as received from Lubbock, Texas, were in an approved condition.

APPARATUS TESTS

To further evaluate the assemblies and the subassembly regulator received from Lubbock, Texas, NIOSH personnel of the Division of Safety Research, Testing and Certification Branch, Respirator Section, conducted a series of performance tests. These tests were directed by Richard Ronk, Chief, Respirator Section, assisted by Samuel Terry, Phillip Arnett, Thomas John, and Nancy Carlock. NIOSH tests were begun

Table 1.--Variations of Lubbock, Texas, Apparatus from BOM or MSHA/NIOSH Approved Apparatus Assembly.

NIOSH Assigned Number	Subassembly	BOM or MSHA/NIOSH Approved Apparatus Subassembly	Lubbock, Texas Apparatus Subassembly
1	Backplate/ harness	800020-04 TC-13F-39	TC-13F-39
	Regulator	800013-00/(demand)	800012-00 (pressure-deman
	Cylinder and valve	800010-00, -10, -02, or -12 (2216 psi)	(1800 psi)[a]
	Facepiece	801450-13 or 17042	BM-13E-08[a]
2	Backplate/ harness	800020-04 TC-13F-40	TC-13F-40
	Regulator	800212-00 or 800212-03	800212-00
	Cylinder and valve	800010-00, -10, -02, or -12 (2216 psi)	(2216 psi)
	Facepiece	801500-15 or 40577	(not marked)
3	Backplate/ harness	BM-13E-08	BM-13E-08
	Regulator	BM-13E-08	BM-13E-08
	Cylinder and valve	(2015 psi)	(2015 psi)
	Facepiece	BM-13E-08	BM-1308

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[a] Incorrect part.

Table 2.—Discrepancies and Defects Found on and Observations Concerning Lubbock, Texas, Apparatus Compared with BOM and MSHA/NIOSH Record Material.

NIOSH Assigned Number	Subassembly	Discrepancies, Defects and Observations
1	Backplate/harness	Rivet torn through belt at buckle end. Frayed strap. Holes through belt material Waist strap missing.
	Regulator	Diaphragm has 1/2 inch by 1/8 inch hole at 10 o'clock.1/ Regulator cover stained at 10 o'clock. Regulator spring stained. Diaphragm stained at vents and at hole. Regulator cover stained at vents Retaining ring exterior stained. High-pressure ring seal to cylinder connection is cracked and leaks.
	Cylinder and valve assembly	Material protruding from male coupling at threads of cylinder gage. Gage bezel cracked. Cylinder valve chain lock missing. Cylinder gage screws loose. Material extruding from safety relief on cylinder. Cylinder gage at 0 psig.
	Facepiece	Dirt covering inside facepiece surface. Wire support broken inside breathing tube. Two screws missing from exhalation valve housing.
2	Backplate/harness	Waist strap missing.
	Regulator	Screw holding mainline valve lock is loose. Top screw of front housing cover of regulator at breathing tube connection is bent and loose. Diaphragm and regulator cover shows staining at vents. High-pressure cylinder seal screw and gasket are loose.
	Cylinder and valve	High-pressure leak at cylinder connection. Cylinder pressure gage guard missing. Cylinder gage at 0 psig.

Table 2:--Continued.

	Facepiece	Facepiece lens surface inside dirty. Breathing tube inner wire support broken in two places. Chin seal portion of facepice is dirty.
3	Backplate/harness	Waist strap missing. Strap tearing at buckle.
	Regulator	Rubber sleeve at clamp of breathing tube to regulator connection has cracks. Screw for mainline valve lock is loose, rendering lock ineffective. Bottom screw of regulator housing cover missing at breathing tube connection side Regulator gage bezel and lens missing. Top screw of regulator housing cover at breathing tube connection side is bent. Diaphragm has 3 inch by 1/16 inch hole and is pulled away from retaining ring at 5:45 and 7:30. Diaphragm is stained at vent. Cover is stained at 5:45 and 7:30. One cover screw is missing. One cover screw is bent. High-pressure ring seal to cylinder connection is missing.
	Cylinder and valve	Cylinder knob locking pin is unlocked. Cylinder gage at 800 psig.
	Facepiece	Inside lens surface dirty. Lens retaining ring dented in several place. Exhalation valve dirty on both sides. Facepiece rubber tearing at left head strap molded retainer support. Facepiece rubber is cracking at right head strap molded retainer support.
4	Regulator	Mainline valve lock inoperable. High-pressure hose cut and gouged. Ring seal missing from high pressure cylinder seal connection.

Table 2.—Continued.

Screws holding back cover housing of regulator are loose.
Gage bezel is cracked.
High-pressure leak at cylinder connection.
Regulator cover shows staining at vents.
Diaphragm regulator not stained.

Diaphragm in envelope shows staining around 3/16 inch by 1/6 inch hole and two additional spots at 30 degrees and 60 degrees from hole.
Regulator plate spring shows staining at vents and about 30 degrees from vent.
Demand valve deflector cracked.

1/ Clock locations observed with regulator outlet at top and regulator cover toward viewer.

on April 23, 1979, and were completed on May 11, 1979. Except for the sodium chloride penetration tests, all tests were conducted as prescribed in BOM Schedule 13E for the BM-13E-08 type of apparatus and as prescribed in MSHA/NIOSH 30 CFR Part 11 for the TC-13F-39 and TC-13F-40 types of apparatus. For the sodium chloride penetration test, the regulators were placed in the center of a test hood which is approximately 36 inches high and 36 inches in circular diameter. The regulators were challenged with a sodium chloride aerosol of approximately 0.6 micrometer mass median aerodynamic diameter at a concentration of approximately 15 mg NaCl/cubic meter. The aerosol was generated by a Frontier Enterprises, Inc., FE 560A nebulizer and measured by a flame photometer. The method is discussed further in "A Guide to Industrial Respiratory Protection" (NIOSH 76-189). Because of the condition of the apparatus as received from Lubbock, Texas, and the desire to not disturb the contents of the Lubbock cylinders, the following tests were performed using the indicated parts. The NIOSH parts were taken from laboratory stock used for approval and check testing of Scott apparatus and were pre-tested for satisfactory operation.

	Backplate/ harness	Regulator	Cylinder and valve	Facepiece
Sodium chloride penetration	NIOSH	Lubbock	NIOSH	NIOSH
Isoamyl acetate penetration	NIOSH	Lubbock	NIOSH	NIOSH
Exhal Resist.	NIOSH	Lubbock	NIOSH	Lubbock
Inhal resist.	NIOSH	Lubbock	NIOSH	Lubbock.
Static press.	NIOSH	Lubbock	NIOSH	Lubbock
Gas flow	NIOSH	Lubbock	NIOSH	N/A
Service time	NIOSH	Lubbock	NIOSH	NIOSH
Remaining service time indicator	NIOSH	Lubbock	NIOSH	NIOSH

A list of all the tests performed by NIOSH, the BOM Schedule 13E and MSHA/NIOSH 30 CFR Part 11 references, the applicable performance level requirements, and the observed performance levels, are shown in Table 3. The performance failures are marked (*) in Table 3.

Table 3.--Performance Testing by NIOSH from 4-23-79 to 5-11-79, of Lubbock, Texas, Self-Contained Breathing Apparatus, Demand (d) and Pressure-Demand (pd).

Type of test	NIOSH Assigned Number	BOM or MSHA/NIOSH Reference	Required Performance Level	Observed Performance Level
NaCl penetration	1	MSHA/NIOSH special	<0.002% expected	14% (d) <0.002% (pd)
	2	do.	do.	0.0039% (d) <0.002% (pd)
	3	do.	do.	7.77% (d)
	4	do.	do.	<0.002% (d and pd as received) 7.69% (d with diaphragm from envelope) 0.00523%(pd with diaphra from envelope)
Isoamyl acetate penetration	1	MSHA/NIOSH 11.85-19	No detectable leakage	large leak (d)*
	2	do.	do.	Test not performed.
	3	BOM 11.32	do.	Very large leaks (d)*
	4	MSHA/NIOSH 11.85-19	do.	Test not performed because diaphragm was not original.
Exhalation resistance 85 lpm	1	MSHA/NIOSH 11.85-6	≤1" H_2O (d) <2" H_2O above static/ ≤3.5" H_2O total (pd)	Too high for test equipment (pd)
	2	do.	do.	4.85" H_2O (pd)*
	3	BOM 11.21 (d)(2)	do.	0.65" H_2O (d)
	4	MSHA/NIOSH 11.8.6	do.	3.15" H_2O as received* 2.1" H_2O w/diaphragm from envelope (pd)

Table 3.—Continued.

Exhalation resistance at breathing machine airflows	1	MSHA/NIOSH 11.85-5	N/A	14.1" H_2O (d) 14.1" H_2O (pd)
	2	do.	N/A	6.44" H_2O (d) 5.82" H_2O (pd)
	3	BOM 11.21 (d)(2)	N/A	1.16" H_2O (d)
	4	MSHA/NIOSH 11.85-5	N/A	1.04" H_2O (d) as received 2.6" H_2O (pd) as received 1" H_2O (d) with diaphragm from envelope 3" H_2O (pd) with diaphragm from envelope
Inhalation resistance	1	MSHA/NIOSH 11.85-5	≤1.25" H_2O (d) >0" H_2O (pd)	-2.91" H_2O (d)* 0.83" H_2O spike (pd)
	2	do.	do.	3.95" H_2O (d)* -1.45" H_2O (pd)*
	3	BOM 11.21 (d)(2)	do.	1.12" H_2O (d)
	4	MSHA/NIOSH 11.85-5	do.	1.95 " H_2O (d) as received -0.42" H_2O spike (pd) as received * 2" H_2O (d) * with diaphrag from envelope >0" H_2O (pd) with diaphrag from envelope
Static pressure	1	MSHA/NIOSH 11.85-6	>0< 1.5 H_2O (pd)	1.37" H_2O (pd)
	2	do.	do.	1.04" H_2O (pd)
	3	N/A	N/A	N/A
	4	do.	do.	0.91" H_2O (pd) as rec'd 1.05" H_2O (pd) with diaphragm from envelope

Table 3.—Continued.

Gas flow	1	MSHA/NIOSH 11.85-8	>200 lpm at full pressure and 500 psi	142 lpm full* 310 lpm 500 psi (pd)
	2	do.	do.	110 lpm full* 112 lpm 500 psi*(pd)
	3	BOM 11.21 (d)(3)	do.	182 lpm full* 200 lpm 500 psi (d)
	4	MSHA/NIOSH 11.85-8	do.	118 lpm full * 180 lpm 500 psi (pd)*
Service time †	1	MSHA/NIOSH 11.85-10	30 minutes	20.3 minutes *
	2	do.	do.	30.9 minutes
	3	BOM 11.21(d)(4)	do.	Not measured because decrease in service time would not be expected for demand unit.
	4	MSHA/NIOSH 11.85-10	do.	31.9 minutes
Remaining service time indicator	1	MSHA/NIOSH 11.82	Operates between 22.5 and 24 minutes	16.3 minutes**
	2	do.	do.	23.2 minutes
	3	BOM 11.21(c)(6)	do.	not measured
	4	MSHA/NIOSH 11.82	do.	25.3 minutes*

* Indicates failure to meet applicable BOM or MSHA/NIOSH performance requirements

** Remaining service time indicator operated at 80% of observed service time (20.3 minutes).

† These times were determined after the high pressure leaks as noted in Table 2 were corrected.

During the tests described in Table 3, NIOSH personnel made the following general observations:

1. Apparatus and regulator with damaged or displaced diaphragms, i.e., NIOSH numbers 1, 3, and 4 (with diaphragm in envelope), showed excessive penetration when operated in the demand mode.

2. All apparatus had airflow less than 200 lpm required at full cylinder pressure.

3. Apparatus with dirt in facepiece, i.e. NIOSH number 1 and 2 showed excessive exhalation resistance.

4. Excessive inhalation resistances of NIOSH numbers 1 and 2 indicated possible regulator interior misadjustment, dirt, or damage.

5. Operation of remaining service time indicators was outside MSHA/NIOSH specifications on NIOSH numbers 1 and 4, indicating misadjusted, dirty, or damaged alarm.

CONCLUSIONS

On the basis of the physical examination and performance testing of the three self-contained breathing apparatus and one regulator, as received from the Lubbock, Texas, Fire Department on April 23 and 24, 1979, NIOSH has determined that the subject apparatus do not meet the applicable requirements of BOM Schedule 13E or MSHA/NIOSH 30 CFR Part 11.

In each instance, several repairs, replacements, and/or adjustments would be required to meet the requirements of BOM or MSHA/NIOSH approval. However, it must be stated that NIOSH has no information concerning the exact condition of the apparatus before or at the time of use at the fire scene on March 25, 1979. All NIOSH observations are limited to the condition of the apparatus as received by NIOSH.

TABLE OF ILLUSTRATIONS

1. Penetration study - regulator mounted in test chamber
2. Penetration study - regulator mounted in test chamber
3. Penetration study - breathing machine and facepiece
4. Unit #1 - Facepiece
5. Unit #1 - Regulator body and diaphragm
6. Unit #1 - Regulator cover
7. Unit #1 - Diaphragm
8. Unit #1 - Cylinder valve assembly
9. Unit #2 - Regulator body and diaphragm
10. Unit #2 - Regulator cover
11. Unit #2 - High pressure coupling
12. Unit #3 - Regulator body
13. Unit #3 - Regulator body and diaphragm
14. Unit #3 - Regulator cover
15. Unit #3 - Exhalation valve
16. Unit #3 - Exhalation valve and interior of facepiece
17. Diaphragm in bag
18. Unit #4 - Regulator cover
19. Unit #4 - Regulator body
20. Unit #4 - High pressure coupling

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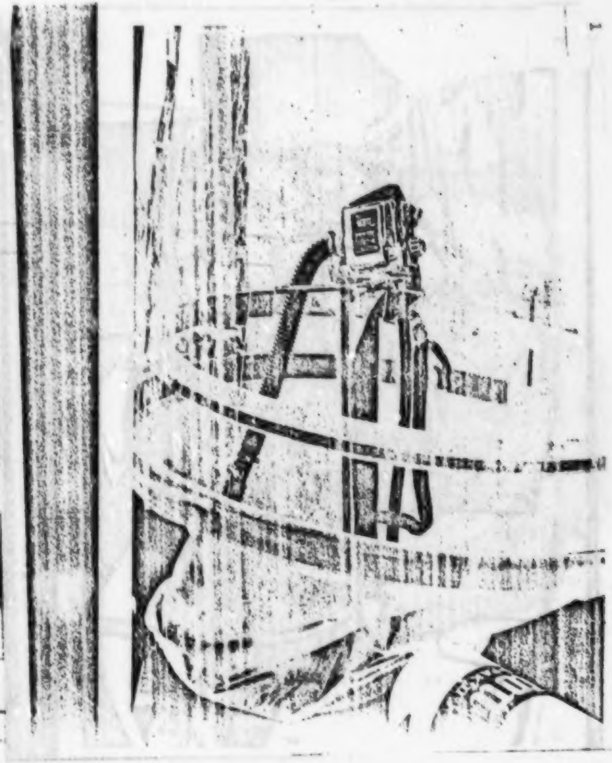

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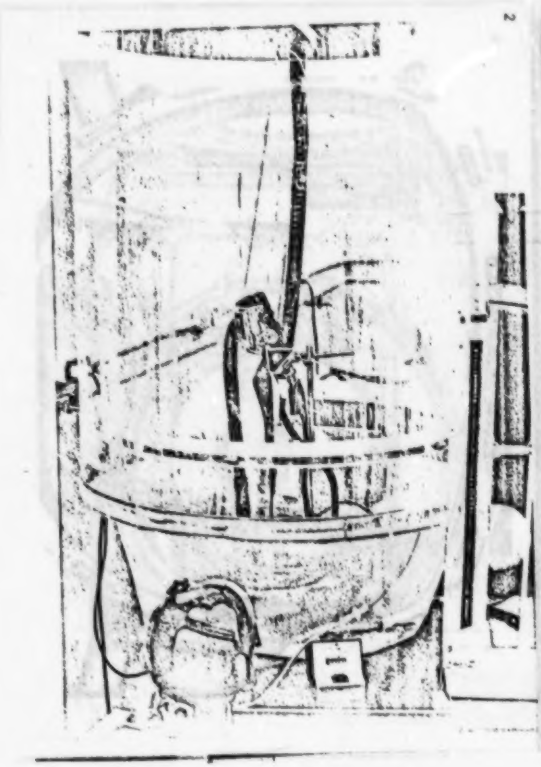

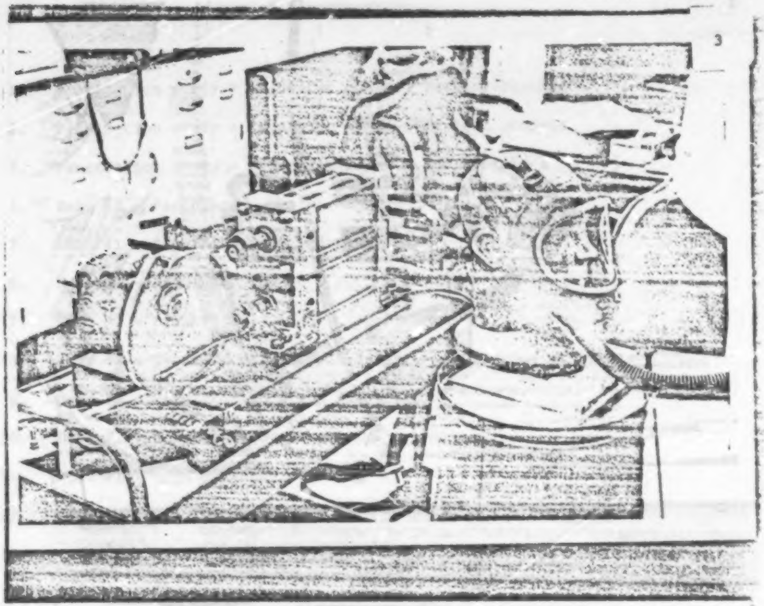

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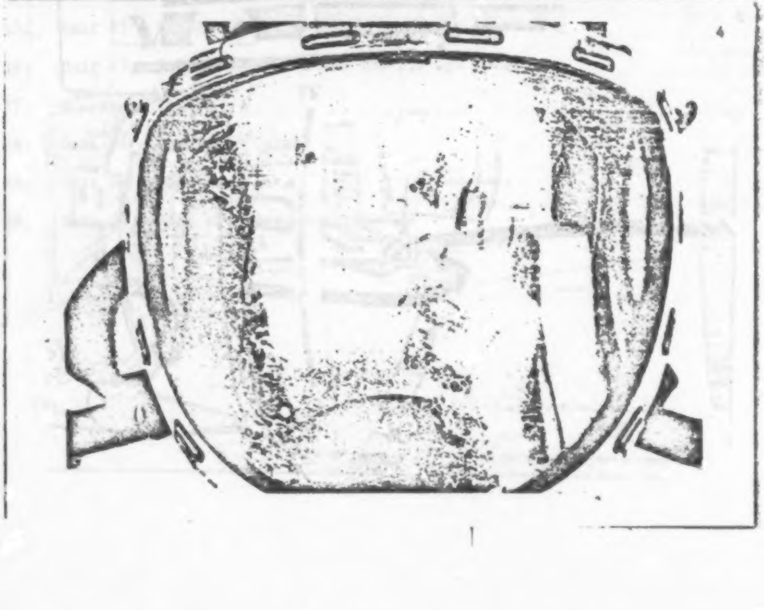

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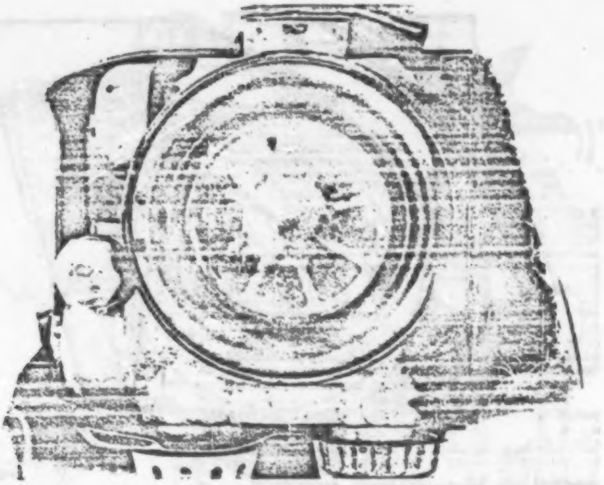

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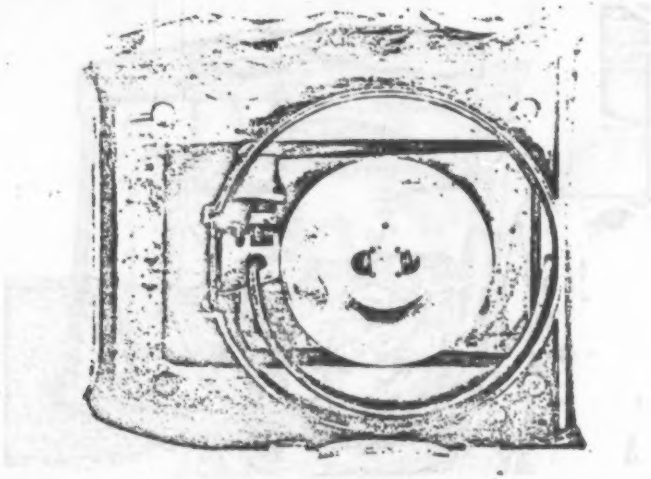

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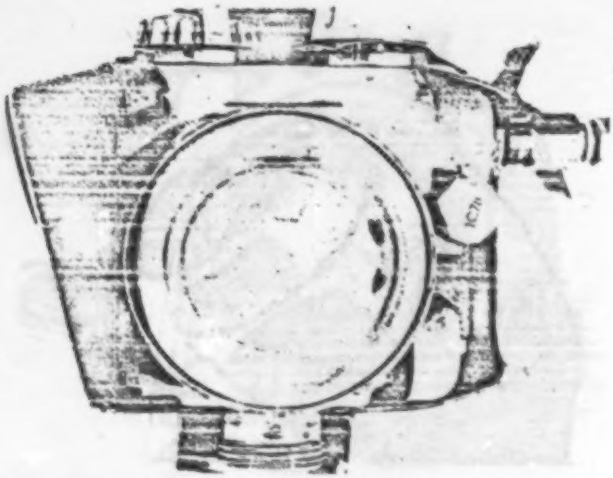

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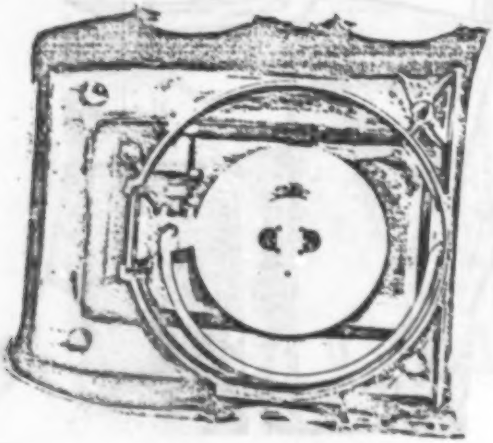

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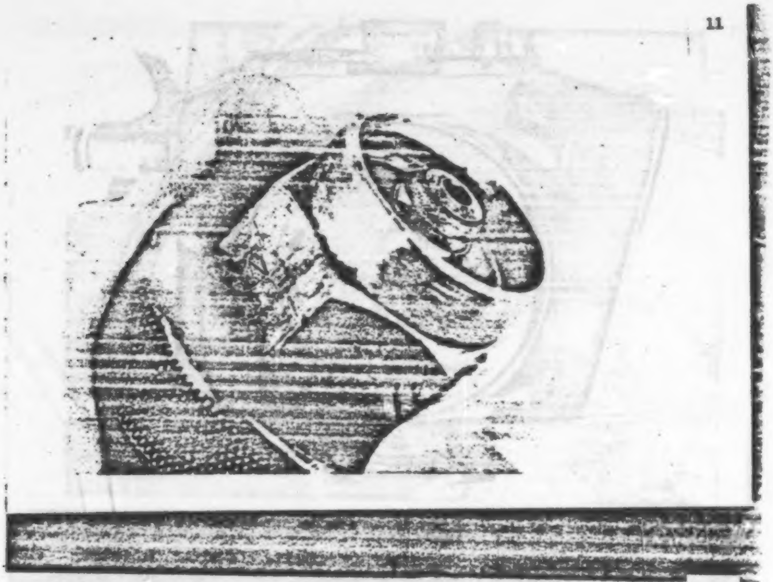

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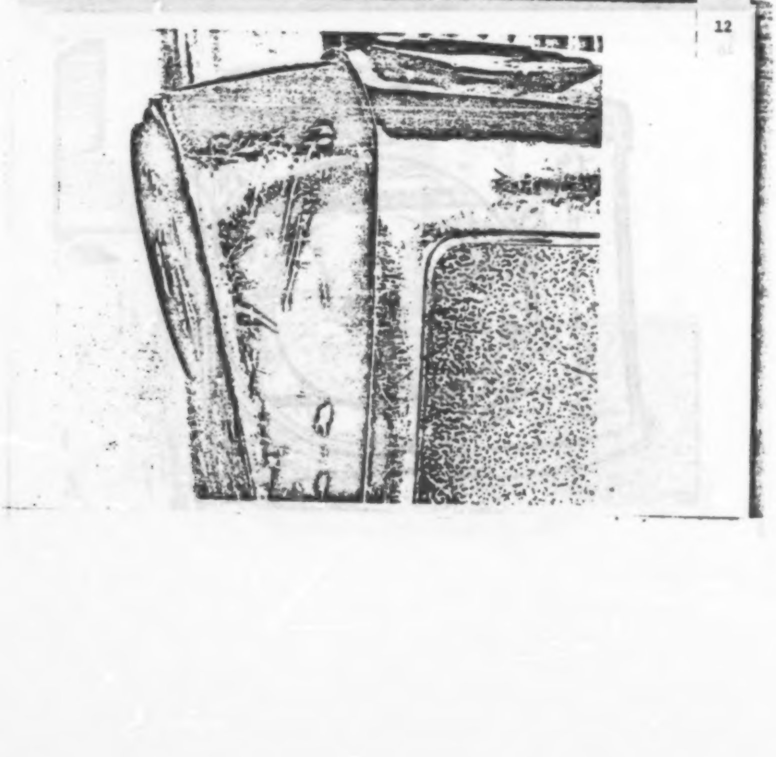

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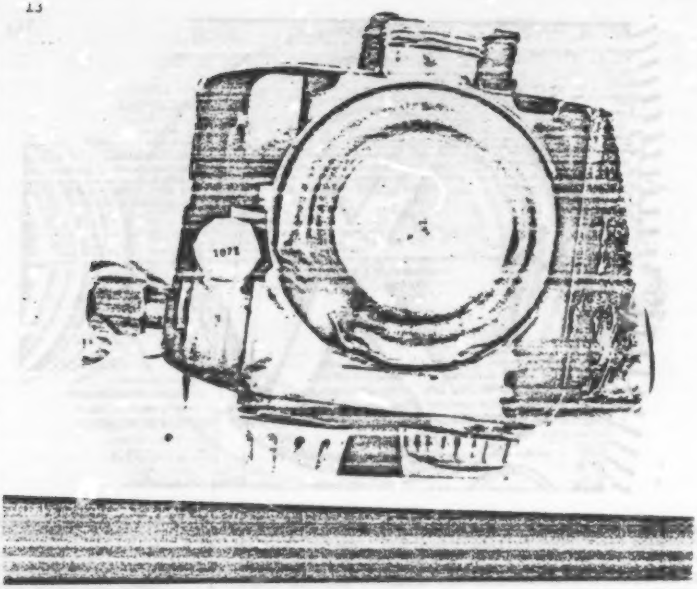

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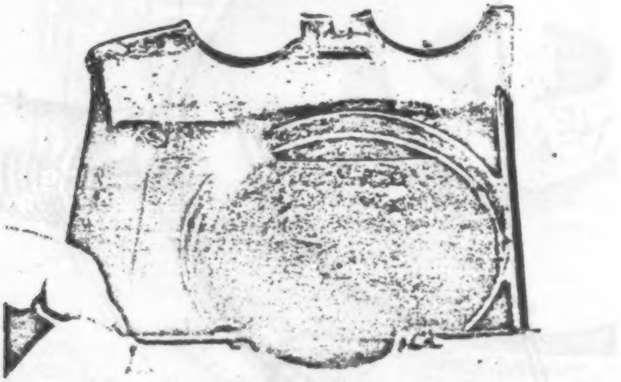

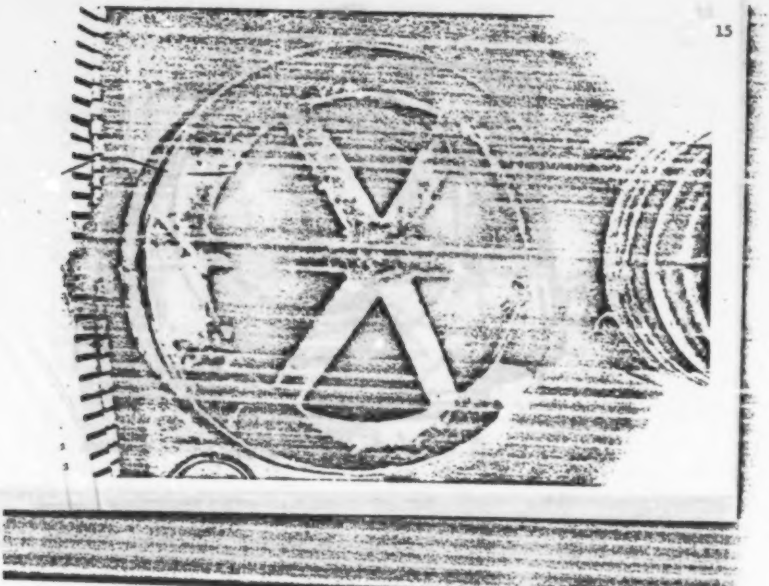

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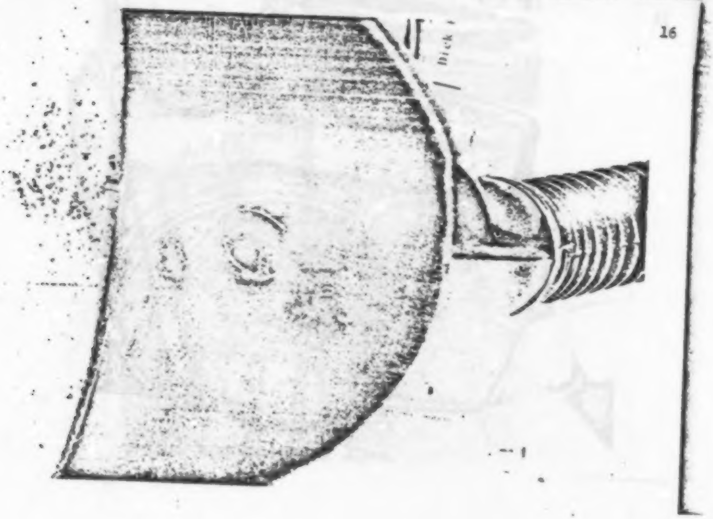

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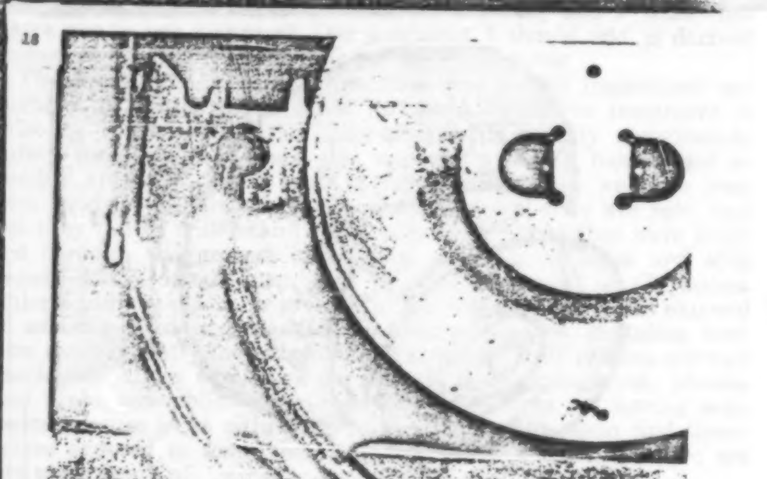

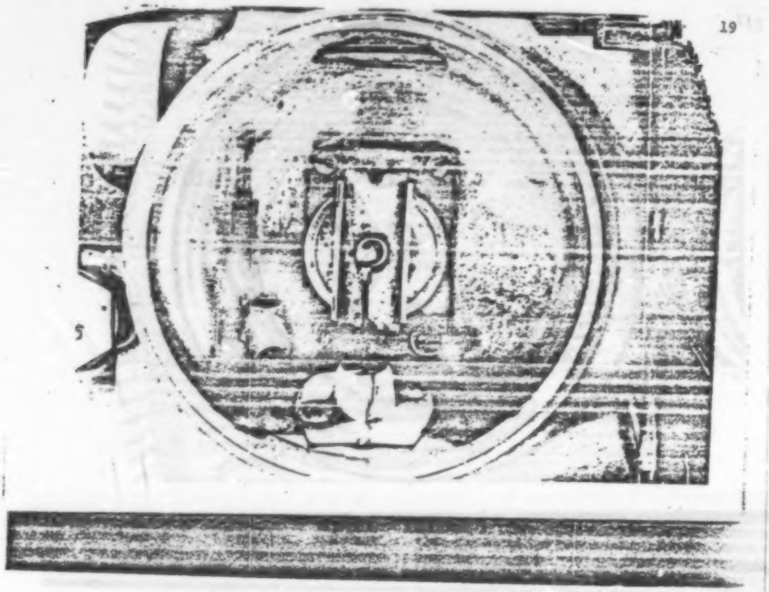

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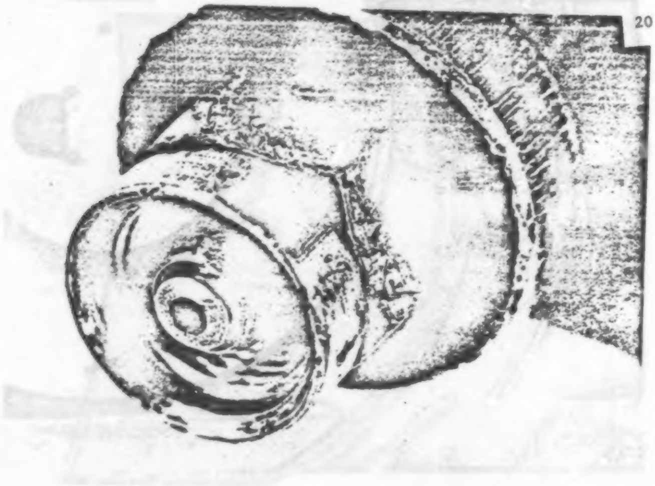

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The **Chairman**. Thank you very much. We will continue through the panel and then have time for questions.

Mr. Robinson?

Mr. **Robinson**. Thank you, Mr. Chairman. My name is George Robinson, and I am director of safety and health for the International Association of Machinists and Aerospace Workers. With me today is my assistant, Miss Lynn McDonald, and also our director of our labor department, Jerry Thompson.

I am happy to have a brief opportunity to comment on the proposed amendment to the Occupational Safety and Health Act now under scrutiny.

In the interest of time, my remarks will be brief. Rather than give a detailed critique of the various provisions of the legislation. I will instead offer my union's overall view of the merits of the bill. A detailed critique will be submitted for the record later this week.

Perhaps you will recall, Mr. Chairman, our previous testimony presented at the OSHA oversight hearing. At that time I attempted to show, through specific examples, that it is very difficult to differentiate between OSHA safety inspections and OSHA health inspections. Safety hazards are frequently interrelated with health hazards, one causing the other as in welding which combines possible ultra violet light flashes and burns with intense heat venting toxic fumes and dust, or they may coexist unknowingly. To try to distinguish between the two, as the Schweiker amendment attempts to do, is at best an academic exercise, and a somewhat naive one in our judgment. Our judgment, I should add, is derived from real life experience in our Nation's industries.

The premise that safety inspections and health inspections are sufficiently unrelated to allow different legislative treatment is false. A routine inspection may discover a readily recognizable safety complaint and may also uncover a health hazard not so readily apparent. I cite again welding. Oftentimes we have men who weld in tanks with no explosions and feel they are safe, and yet they fail to understand the deadly toxic fumes that were emitted through the process of welding, working on ships and ship repair. Many of our men, men of all ranks, men of all unions, unions and nonunions, who work in the repair of ships, are exposed to asbestos, lead, and many other toxic substances, including even now more recently the effects of radiation. Aircraft repairs, aircraft mechanics, those who work on aircraft in changing tires, wheels, and brake assemblies oftentimes find themselves not having accidents because jacks either slip or are faulty, but again find themselves exposed to toxic chemicals and substances that they were not even aware of.

We must remember that health hazards are frequently not easy to detect and may exist without either the employer or employee having knowledge. A routine targeted inspection program offers the best hope of discovering these individual problems.

I can cite figures that were given to me—and I heard them today testified to—some 57,000 inspections of OSHA in 1979, and of that some 1,306 referrals—really were referrals made by those OSHA inspections that finally related themselves to health inspections, using the services of OSHA.

In previous testimony I described toxic atmosphere discovered on a routine inspection of a steel tank manufacturer. The employees were not aware of the potential for explosion inside the tanks. Without that OSHA inspection, the situation would probably continue until someone got hurt.

In another example I identified a mercury contamination problem which employees were unaware of. The high exposure levels were discovered through another routine inspection which prompted a sampling visit by an OSHA industrial hygienist shortly thereafter.

The reason I bring all this up and in fact the reason that I am here again today is that the Schweiker amendment misses the main point of the OSH Act and its inspections program. OSHA is aimed at preventive discovery of both health and safety problems before they take their toll. Under the Schweiker amendment, which mistakenly attempts to isolate workplace dynamics, accidents have to occur first before a firm is subject to inspection. We in the machinists union very much resent the very idea that our members, and workers, have to become victims before corrective action is taken.

We have listened to supporters of the amendment who point to the serious and imminent danger provisions in the proposal which bring an OSHA inspector after a complaint is called. Given the response requirements outlined in the Schweiker amendment, we are not convinced that these situations can be properly handled by OSHA itself. The bill S. 2153 to me represents only a carefully worded escape clause for management and does not serve the worker. How do you identify a serious problem over the telephone?

We are also concerned about the dangers which we may not be fully aware of which are detected during routine inspections and which can be corrected before they hurt someone.

We do not accept at all the Schweiker reliance on workers compensation reports for business exemptions. Years of experience have shown us that the name of the game in many firms is that few accidents mean low premiums. If in one way or another a business can avoid reporting an accident, the better it looks to the insurance company. But this certainly doesn't make the workplace any safer.

Mr. Chairman, I can cite my own personal experiences working as a union representative, where companies themselves knowingly told their supervisory personnel to talk with the employees and to discourage them filing claims as though they were accidents happening on the job and really they were injuries related to outside other than job injuries themselves.

If I may, I would like to draw an analogy to the Schweiker amendment which I think represents a parallel situation. Over the years we have seen crime rates rise and fall. The types of crimes change, and the locations change. But although crimes increase and change and the cases are not solved, we do not do away with the police force. We do not assume that a residence with 10 or fewer occupants is any safer than a highrise apartment. We do not assume that because a crime has never occurred in a certain place that it never will. We certainly do not remove police protection from crime-free areas. In fact, we like to think that police protection has maintained a crime-free area. We know the high-crime areas and concentrate a certain amount of the police presence there, but we certainly do not suggest that the police protection be reduced or withdrawn from other areas and offer only a 911 emergency dial when a crime is happening or has already occurred.

It's a terrible tragic thing to come before the American people and find themselves in a situation where they would be dialing the police station saying that a crime is happening and have to describe is it a dangerous type crime, does the assailant have a gun, is there possibly going to be immediate harm for the person.

Our logic and social philosophy about crime prevention would instantly reject such outlandish approaches to crime prevention. For similar reasons of logic and human life, we reject the Schweiker amendment which in effect would impose this outlandish idea on occupational safety and health.

Senator Schweiker draws selectively on the interagency task force on workplace safety and health for much of his defense of the proposed amendment. Were he to examine closely the task force report he would find that they almost exclusively relied on safety data in reaching their conclusions. They wrote the report as though health problems did not exist or have a cause and effect relationship with safety. This chronic problem of dealing with safety only becomes more apparent in reading the supporting documents. We too have read the report which Senator Schweiker refers to and found the suggestions for targeting inspections well taken. However, I understand that OSHA is now doing administratively what Schweiker seeks legislatively. Yesterday's Wall Street Journal explains the program although it is unfortunate that a Georgia bakery had to be used as an example. As the item points out, however, if only 1 percent of workplaces can be inspected a year, how many times will this example occur that was reported in the Wall Street Journal with the Georgia bakery?

Certainly again, Mr. Chairman, what happened and what was cited in the Wall Street Journal yesterday should not be cause for taking away from working people the law that took 200 years to establish.

Our union is uncomfortable with Senator Schweiker's attempt to legislate the performance of safety and health committees, a matter which we have traditionally handled at the bargaining table. When joint committees are a matter of the negotiated contract, and the performance does not meet contract provisions, we can begin to correct the problem rather quickly through the grievance and arbitration system which has worked rather well for us over the years. Senator Schweiker's attempt to put safety committee performance into the law, with performance monitored by OSHA, takes an important lever away from us. The amendment specifically requires an employer response to committee suggestions, but appears to leave interpretation of that response to a Government official. While I think I understand what is intended, this infringement on traditional free collective bargaining causes us concern in the long run. And we certainly would not like to discourage our lodges from participating in joint committees.

Before closing, Mr. Chairman, I would like to mention something which came to my attention last week and of which I personally disapprove. I question the propriety of a bulletin which Senator Schweiker recently sent to many of our Machinists Union members. I question the propriety of a U.S. Senator using misleading information in an official communication on letterhead stationery, particularly when it accuses unions of telling lies to their membership.

In Senator Schweiker's bulletin he refers to as false a union publication's claim that his amendment would exempt 90 percent of workplaces from OSHA's jurisdiction. It seems to us that a bill which prohibits routine inspection targeting from a specific class of workplaces does precisely that. In his bulletin, the Senator overlooks this detail. I would like to remind the Senator of his own remarks in the Congressional Record when introducing his bill. When describing how firms would qualify for the inspection exemption, he refers to BLS data showing that approximately 90 percent of all workplaces would qualify under this test. If there is any misrepresentation at all, it is in the Senator's use of the 90 percent figure which, according to Senator Frank Church himself, is closer to 94 percent exemption of all business establishments.

The Senator states as false another union publication which said S. 2153 takes away the rights of workers to safety inspections in response to complaints. We do not believe that a letter or telephone call from OSHA in the event of an employee complaint is equivalent to a safety inspection which Senator Schweiker suggests in his bulletin. Neither do we consider Senator Frank Church a friend of OSHA as Senator Schweiker does in his bulletin. I would like to remind every one here of Senator Church's remark when this bill was introduced: "It is a heartening development for those of us who have fought so long to amend the OSHA law."

We do not appreciate these misrepresentations to our members, Mr. Chairman, nor do we appreciate Senator Schweiker's suggestion that we are looking for an election year issue. We have been up here on Capitol Hill every single time there has been a threat to OSHA and we will be here in the future long after Senator Schweiker has gone. If Senator Schweiker is going to communicate with our membership, then he ought to be more forthright with them.

In summary, Mr. Chairman, I wish to state that we find Senator Schweiker's amendment, for all its length, based on false theory and apparently drawn from technocrats with little experience in America's industries. We reject the assumption that safety inspections are distinct and unrelated to health inspections. We further reject the ultimate result which Senator Schweiker seeks, that of taking OSHA, an agency aiming to prevent accidents and diseases which we have endured for far too long and reducing it instead to a paperpushing agency which certifies workers compensation reports at the national level and reads consultation reports and safety committee meeting minutes at the local level. To wait until damage is done or on the brink of taking place reminds us of the 19th century laissez-faire, hands off, industrial philosophy which we thought we had left in the 19th century.

Two hundred years was a long time, perhaps too long, for the American workers to wait for their elected representatives to legislate safety and health in the workplace. And now in a matter of months perhaps we find that legislators are possibly willing to turn back the hands of time, back to the days of old. America's workers may be what we may sometimes call an easygoing lot, although they fought very hard in war, but I am certain, Mr. Chairman, the patience of all the American workers, union and nonunion alike, is coming to a short end when they find that the Congress of the United States would dare consider taking away a law that has finally after so long given them some rights to protect their safety and to protect their health.

Mr. Chairman, I again appreciate the opportunity of coming before your committee. I would appreciate that you will take my statement as being forthright and from my heart.

Thank you.

The CHAIRMAN. We certainly do, and look forward to the more detailed analysis of the legislation before us.

Will you be commenting on all the bills that are referred to this committee?

Mr. ROBINSON. Senator, this time it was S. 2153, but we can address all the other bills.

The CHAIRMAN. We could use your views, too, on the other bills that are before us. We will have to handle them one way or the other. So it would be helpful.

Mr. ROBINSON. Yes.

[The prepared statement of Mr. Robinson follows:]

Statement submitted by

George J. Robinson, Director

Occupational Safety & Health

and Community Services

International Association of Machinists

and Aerospace Workers

Senate Committee on Labor and Human Resources

April 25, 1980

S.2153 "Occupational Safety & Health Improvements Act of 1980"

S.1486 "Occupational Safety & Health Amendments of 1979"

S.1272 "Family Farm Occupational Safety & Health Amendments of 1979"

Good morning, Mr. Chairman. My name is George Robinson and I am Director of Safety and Health for the International Association of Machinists and Aerospace Workers. I am happy to have a brief opportunity to comment on the proposed amendments to the Occupational Safety and Health Act now under scrutiny.

In the interest of time, my remarks will be brief. Rather than give a detailed critique of the various provisions of the legislation, I will instead offer my union's overall view of the merits of each bill.

Perhaps you will recall, Mr. Chairman, our previous testimony on S. 2153, known as the Schweiker Amendment, presented at the OSHA oversight hearing. At that time I attempted to show - through specific examples - that it is very difficult to differentiate between OSHA safety inspections and OSHA health inspections. Safety hazards are frequently interrelated with health hazards, one causing the other as in welding which combines possible ultra violet light flashes and burns with intense heat venting toxic fumes and dusts. In fact, they may co-exist unknowingly. To try to distinguish between the two, as the Schweiker Amendment attempts to do is at best an academic exercise, and a somewhat naive one in our judgment. Our judgment, I should add, is derived from real life experience in our nation's industries.

The premise that safety inspections and health inspections are sufficiently unrelated to allow different legislative treatment is false. A routine inspection may discover a readily recognizable safety complaint and may also uncover a health hazard not so readily apparent. We must remember that health hazards are frequently not easy to detect and may exist without employers' or employees' knowledge. A routine targeted inspection program offers the best hope of discovering these individual problems.

In previous testimony I described toxic atmospheres discovered on a routine inspection of a steel tank manufacturer. The employees were not aware of the potential for explosion or health hazards inside the tanks. Without that OSHA inspection, the situation would probably continue until someone got hurt.

In another example I identified a mercury contamination problem which employees were unaware of. A sickness through high exposure levels of mercury was discovered through a routine inspection that prompted a sampling visit by an OSHA industrial hygienist.

The reason I bring all this up is that the Schweiker Amendment misses the main point of the OSH Act and its inspections program. OSHA is aimed at preventive discovery of both health and safety problems before they take their toll. Under the Schweiker Amendment, which mistakenly attempts to isolate workplace dynamics, accidents have to occur first before a firm is subject to inspection. We in the Machinists Union very much resent the very idea that our members have to become victims before corrective action is taken.

We have listened to supporters of the amendment who point to the serious and imminent danger provisions in the proposal which bring an OSHA inspector after a complaint is called. Given the response requirements outlined in the Schweiker Amendment, we are not convinced that these situations can be properly handled by OSHA. How do you identify a serious problem over the phone? We are also concerned about the dangers which we may not be fully aware of which are detected during routine inspections and which can be corrected before they hurt someone.

We do not accept at all the Schweiker reliance on workers compensation reports for business exemptions. Years of experience have shown us that the name of the game in many firms is that fewer accidents mean low insurance premiums. If in one way or another a business can avoid reporting an accident, the better it looks to the insurance company. But this certainly doesn't make the workplace any safer. Similar use of the BLS data lacks sensitivity to workplace reality because it is based on sampling of industrial classes without differentiating individual firms. A firm in a low injury rate SIC category may still have an individual high rate of injury.

If I may, I would like to draw an analogy to the Schweiker Amendment which I think represents a parallel situation. Over the years we have seen crime rates rise and fall. The types of crimes change, and the locations change. But although crimes may decrease, we do not do away with the police force. We do not assume that a residence with 10 or fewer occupants is any safer than a high rise apartment. We do not assume that because a crime has never occurred in a certain place that it never will. We certainly do not remove police protection from crime-free areas. In fact, we like to think that police protection has maintained a crime free area. We know the high crime areas and concentrate a certain amount of the police presence there, but we certainly do not suggest that the police protection be reduced or withdrawn from other areas and offer only a 911 emergency dial when a crime is happening or has already occurred. Our logic and social philosophy about crime prevention would instantly reject such outlandish approaches to crime prevention. For similar reasons of logic we reject the Schweiker Amendment which in effect would impose this outlandish idea on occupational safety and health.

Senator Schweiker draws selectively on the Interagency Task Force on Workplace Safety and Health for much of his defense of the proposed amendment. Were he to examine closely the Task Force report he would find that they relied almost exclusively on safety data in reaching their conclusions. They wrote the report as though health problems did not exist or do not have a cause-effect relationship with safety. This chronic problem of dealing with safety as a distinct, exclusive, and self-contained entity becomes more apparent in reading the supporting documents of the task force report.

We too have read the report which Senator Schweiker refers to and found the suggestions for targeting inspections well taken. We agree that it certainly would be more effective "if OSHA increased the frequency of its safety inspection in direct proportion to the above-average rate of serious injuries at particular establishments, while reducing the frequency of inspections as better-performing establishments approached the industry average."[1] But how this is achieved and whether it is possible is where we have difficulty in accepting later conclusions of the Task Force report.

The Task Force report acknowledges that workers compensation and BLS data have inherent inadequacies of measurement. What we see the Task Force report seeking, therefore, is a new data base which will provide the numbers to fit a theoretical targeting model and rejecting existing data collection systems, to wit: BLS and workers compensation. Certainly models must be constructed in the theoretical world for broad policy discussion purposes. We want to see improvement and refinement in injury and illness data collection, but we take a dim view of creation of a new data system which justifies a new inspection targeting theory.[2]

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1) Making Prevention Pay, Final Report of the Interagency Task Force on Workplace Safety and Health, Dec. 14, 1978. p.III-6

2) ibid. p.III-7. "Implementing HIRE raises questions about the availability and accuracy of establishment-level injury data, a topic which has long troubled OSHA. The existing data sources are state workers' compensation (WC) systems and annual BLS surveys. It is true that BLS does not compile complete information for smaller establishments, that injury data on mobile worksites may not reflect conditions reporting employers can control, and that because of statistical anomalies a manufacturing establishment with ten employees which happens to experience one lost workday injury will have a rate of 10 (twice the industry average) even with an exemplary safety program."

Interestingly, as supporters and opponents of S.2153 argue over the pros and cons of the bill, I understand that OSHA is attempting on an experimental basis what the Task Force report suggested as an administrative change and what Schweiker seeks as legislative change. Note in Secretary Bingham's testimony April 15, 1980, she is not confident that this is the proper way to go.

Yesterday's Wall Street Journal (attached April 14, 1980, Appendix) explains the pilot targeting program although it is unfortunate that the Georgia bakery had to be used as an example. As the item points out, however, if only 1% of workplaces can be inspected a year, how many times will this example occur? Not many, we think.

To conclude my observations about targeting I would like to say that it may not truly be possible to achieve the kind of scientific targeting sought by Senator Schweiker and the Interagency Task Force. This is because they try to deal with large numbers in a static environment created by recorded injuries which have already occurred. I need not remind the Committee that certain types of work do not become less hazardous merely because fewer numbers of employees are involved. People are injured and contract diseases in large as well as small shops. To try to legislatively exclude certain classes of employees is we think taking a tunnel view of working America.

The kinds of targeted inspections we are willing to go along with are those administratively attempted by OSHA. We want and need what we have under the OSH Act and will not permit academic tinkering. We agree with Secretary Bingham when she said that there is a "difference between a legislated exemption and an administratively determined and adjustable allocation of resources—or 'targeting' scheme. The likelihood of an inspection should vary with the hazardousness of the workplace, but the possibility of an inspection should always exist."[3]

My union is uncomfortable with Senator Schweiker's attempt to legislate the performance of safety and health committees, a matter which we have traditionally handled at the bargaining table. When joint committees are a matter of the negotiated contract, and the performance does not meet contract provisions, we can begin to correct the problem rather quickly through the grievance and arbitration system which has worked rather well for us over the years. Senator Schweiker's attempt to put safety committee performance into the law, with performance monitored by OSHA takes an important lever away from us. The amendment specifically requires an employer response to committee suggestions, but appears to leave interpretation of that response to a government official. While I think I understand what is intended, this infringement on traditional free collective bargaining causes us concern in the long run. And we certainly would not like to discourage our lodges from participating in joint committees.

We have also reviewed, Mr. Chairman the other two OSH Act amendments before the Committee; S.1486 and S.1572, which again seek to exempt certain classes of employees from OSHA protections because the employer reports a low injury rate. Again, we apply the same logic earlier used in our police protection analogy: that police presence is a crime deterrent and that although we concentrate greater numbers of patrols in high crime areas, we do not completely withdraw patrols from relatively crime-free areas.

3) Testimony of Secretary Eula Bingham before Senate Committee on Labor and Human Resources, hearings, April 15, 1980, p.4.

S.1486, the "Occupational Safety and Health Amendments of 1979" seeks to exempt farms with 10 or fewer employees, farms with temporary labor camps, and small businesses in nonhazardous SIC categories. We do not see any special magic in farming which justifies its exemption from OSHA coverage, particularly since agriculture is one of the most hazardous occupations in this country (ranking third).

The Standard Industrial Classification system is a convenient but imprecise system which gives business a general industry description. However, the groupings of businesses within an SIC is also arbitrary. Our union, given its size, found the BLS SIC too vague for our contract use and we have developed our own six diget system to more clearly identify a shop or plant. The same vague and arbitrary assignment of an SIC number to a business may very well disguise the injury performance of a specific firm. And once again, S.1486 as the Bartlett Amendment before it, seeks to remove these small businesses from all accountability—no inspections, no investigations, no consultation, no safety training.

S.1572, the "Family Farm Occupational Safety and Health Amendments of 1979" seeks to exempt from OSHA small farms (10 or fewer employees) which do not operate migrant camps. Once again we call attention to the fact that agriculture is the third most dangerous work in the country and certainly should not be removed from responsibility for meeting anhydrous amonia and machine guarding standards among others, OSHA inspections, and enforcement. We also reject the notion, suggested in this amendment, that a farm with 10 or fewer is safer than a farm with 11 or more employees.

S.1572 identifies itself with "Family Farm" interests. Yet OSHA openly acknowledges that the agency, as a matter of policy, does not inspect farms where the workers are members of the farmer's family. Because of the wording of S.1572, however, all farms employing 10 or fewer (and without migrant labor camps) would be exempt, which goes well beyond the term "family" farm. In both these bills eyes are shut to the chemical hazards to which all agriculture workers are potentially exposed. Because we find so many young people in this work we are particularly concerned that they will be exposed to harmful pesticides and fertilizers during their developing years and that there will be no technical intersession possible because OSHA would be barred from the premises.

Before closing, Mr. Chairman, I would like to mention something which came to my attention last week and of which I personally disapprove. I question the propriety of a bulletin which Senator Schweiker recently sent to many of our Machinists Union members (copy attached). I question the propriety of a United States Senator using misleading information in an official communication on letterhead stationery particularly when it accuses unions of telling lies to their membership.

In Senator Schweiker's bulletin he refers to as false a union publication's claim that his amendment would exempt 90% of workplaces from OSHA's jurisdiction. It seems to us that a bill which prohibits routine inspection targeting from a specific class of workplaces does precisely that. In his bulletin, the Senator overlooks this detail. I would like to remind the Senator of his own remarks in the Congressional Record when introducing his bill: when describing how firms would quote "approximately 90% of all workplaces would qualify under this test" unquote.

If there is any misrepresentation at all, it is in the Senator's use of the 90% figure which, according to Senator Church, is closer to 94% exemption of all business establishments.

The Senator states as false another union publication which said S.2153 takes away the rights of workers to safety inspections in response to complaints. We do not believe that a letter or telephone call from OSHA in the event of an employee complaint is equivalent to a safety inspection which Senator Schweiker suggests in his bulletin. Neither do we consider Senator Frank Church a friend of OSHA as Senator Schweiker does in his bulletin. I would like to remind every one here of Senator Church's remark when this bill was introduced — quote "it is a heartening development for those of us who have fought so long to amend the OSHA law" unquote.

We do not appreciate these misrepresentations to our members, Mr. Chairman, nor do we appreciate Senator Schweiker's suggestion that we are looking for an election year issue. We have been up here on Capitol Hill every single time there has been a threat to OSHA and we will be here in the future long after Senator Schweiker has gone. If Senator Schweiker is going to communicate with our members, he ought to be more forthright.

In summary, Mr. Chairman, I wish to state that we find Senator Schweiker's Amendment — for all its length — based on false theory and no doubt drawn from technocrats with little experience in America's industries. We reject the assumption that safety inspections are distinct and unrelated to health inspections. We further reject the ultimate result which Senator Schweiker seeks: that of taking OSHA, an agency aiming to prevent accidents and diseases which we have endured for far too long and reducing it instead to a paperpushing agency which certifies workers compensation reports at the national level and reads consultation reports and safety committee meeting minutes at the local level. To wait until damage is done or on the brink of taking place reminds us of the 19th century laissez-faire (hands off) industrial philosophy which we thought we had left in the 19th century.

Thank you, Mr. Chairman, for the opportunity to present our general view of the amendment.

The CHAIRMAN. All right, now Mr. Eller, please.

Mr. ELLER. My name is Stanley Eller, and I am the director of health and safety for the International Chemical Workers Union. I have with me today Robert Marlowe, who is our Washington representative, and this testimony is being presented on behalf of Frank Martino, who is the president of the International Chemical Workers Union.

I have also provided, Mr. Chairman, the committee with copies of the testimony which we provided at the previous hearing, because it will be referred to in this testimony for additional questions, in case you have them, based on that testimony.

I would like them included in the record, if I might, also as part of this testimony.

The CHAIRMAN. They will be.

Mr. ELLER. The following testimony is presented on behalf of the 75,000 members of the International Chemical Workers Union whose efforts to improve their workplace conditions would be severely undermined and whose very lives would be substantially endangered should the mistitled Occupational Safety and Health Improvements Act of 1980 receive favorable action from this committee. Such action would surely cause the working people of the United States to question whose interests this committee serves. The responsibility for the increased deaths and mutilations resulting from the elimination of Federal safety protection for 90 percent of U.S. workplaces must clearly be borne by the supporters of the proposed amendment. The constituency which the International Chemical Workers Union represents includes workers who not only are at the highest risk for suffering adverse health effects, but also are exposed to significant safety hazards. Generally, poor maintenance in the chemical industry and the effects of corrosive substances have turned many workplaces into time bombs. The high pressure and temperatures which are common, combined with highly volatile substances, are an invitation to disaster when a plant is poorly maintained or the work force is inadequately trained. We believe that many of these safety hazards are readily identifiable and easily eliminated through the functioning of an effective compliance program. The safety compliance program of OSHA is the only legal recourse which workers have to compel safety hazard abatement and this program is essential for the elimination of health hazards through its referral program. We do not deny that OSHA has not been able to develop the comprehensive inspection program which American workers deserve and were promised. However, we do not see any improvements which would result from passage of Senate bill 2135, nor can we comprehend how fewer inspections will provide more protection. From our own experiences we will provide testimony to demonstrate that the basic provisions and underlying assumptions of the proposed bill do not reflect either the needs of American workers or the reality of the struggle by workers to improve their working conditions.

Under this proposed legislation employers would be exempt from safety inspections if they qualified under a scheme establishing a socially acceptable number of deaths or lost workday injuries. This plan would rely on workers' compensation records and employer affidavits.

The use of workers' compensation records assumes that they are readily available and that they are accurately maintained and reflect workplace experience. It also assumes the veracity of employers in reporting injuries for compensation and in recording injuries which are work related.

Even if the inadequacies of the current workers' compensation system were remedied and OSHA were to become actively involved in the collection and evaluation of records, there would be two negative occurrences. The severely limited resources of OSHA would be diverted into bureaucratic paper shuffling. The $5 million per year pricetag proposed for upgrading the claims processing and recordkeeping requirements of this bill are unlikely to underwrite the taxpayers' costs due to the diversity of State programs.

The benefits of underreporting and the lack of penalties for violations would provide additional incentives to inaccurate reporting. Numerous recordkeeping violations have been documented through OSHA investigations and through interviews with workers. Because of underreporting, many plants would be exempt until it is time to count the bodies. The American Cyanamid plant in Bound Brook, N.J., where there are over 1,000 employees, would have been exempt in 1979 when there was 1 fatality, 1 amputation, and an accident resulting in 17 persons being hospitalized. This company has also been cited for willfully exposing its employees to regulated bladder carcinogens. The report of an investigation into the bladder cancers at this facility was included as appendix I in recent testimony before this committee.

During the recent OSHA oversight hearings, we presented evidence of recordkeeping violations which occurred at plants in Boyertown, Pa; Huntsville, Ala.; and Trona, Calif. Upon review of the record, the Kawecki-Berylco plant in Pennsylvania would have been exempt under this bill despite the fact that fines in excess of $6,000 were levied for safety violations which included over 41 items. The text of an interview with an International Chemical Workers Union member which indicates recordkeeping violations, and a recent citation issued against the Johns-Manville Corp., are attached as appendixes A and B. These are but a few examples.

Traditionally, the International Chemical Workers Union has actively supported the establishment of joint health and safety committees. These committees have seen encouraged to collectively identify and abate safety and health hazards. Union committee members are instructed to inform the company of existing hazards in order to eliminate the problem and to develop a nonadversary working relationship. This union policy is based on the right of recourse to OSHA upon the employer's procrastination or refusal to abate the hazards. The union's health and safety department is currently providing training for committee members to enable them to function more knowledgeably in recognizing and abating hazardous conditions.

Because of the limited time for this testimony, the results of specific cooperative efforts have not been included, but we are prepared to discuss them.

Senate bill 2153 would undermine these efforts by referring workers complaints back to the employer and by excluding worker efforts and documentation in OSHA proceedings. There would be no purpose in cooperating directly with the company until all identified hazards were referred through OSHA. Furthermore, willful citations would be eliminated for any hazard which a worker brought to the company's attention.

In our experience most willful citations rely heavily on worker efforts and information. Examples of this were introduced in previous testimony. If this bill were to pass, serious reevaluation of the union's policy on joint health and safety committees would be required.

Voluntary compliance is in most cases a myth and as a workable model, a cheap deception. Had voluntary compliance succeeded, there would have been no need for legislation such as the Mine Safety Act of 1969 or the Occupational Safety and Health Act of 1970. Once these were established as national policy in 1970, we should have seen a marked increase in employer efforts to reduce occupational injury and illness. Instead we see increased opposition by employers to improve the quality of working conditions and to work cooperatively toward those goals.

As the International Chemical Workers Union has increased the number of occupational health and safety professionals on its staff and as it has undertaken to provide training for its members, employers have become increasingly resistant to working with the union. This is particularly true of the management of smaller companies and at smaller plants, which is where the majority of the International Chemical Workers Union's membership is employed.

Company resistance has taken many forms. The union has been refused basic information such as a list of substances present in the plants, industrial hygiene data, aggregate medical surveillance data, injury and illness records, insurance records, and access to the plant itself. The most frequent justifications for these actions are that the company is already overburdened with outside inspec-

best copy available

tors and that trade secrets would be jeopardized. Given the current level of OSHA staffing, I doubt that many employers could legitimately claim harassment. Since unions have a vested interest in the economic health of the employer, they are not likely to jeopardize their members' jobs. If trade secret disclosure were a real threat, I should think there would be more concern of leaks through an outside consulting program.

In summary, let me state that Senate bill 2153 which is before this committee is fatally flawed both in its statistical concept and its reliance on voluntary compliance. Should this bill pass, all American workers will suffer and particularly those who are unorganized.

If it is the firm resolve of this committee to improve the Occupational Safety and Health Act, then we encourage it to begin by introducing legislation which would expand OSHA's scope and increase its regulatory and compliance capabilities.

If the committee still believes that voluntary compliance can succeed, then we encourage it to introduce legislation which would provide the incentive for such success. The penalties should equal the crimes. For every injury or death resulting from a violation, the responsible corporate official should be subject to the appropriate criminal penalties.

In closing, the International Chemical Workers Union wishes to encourage the members of this committee to reject Senate bill 2153 because of the devastating effect which its passage would have on all U.S. workers.

[The following was included for the record:]

TESTIMONY

OF THE

INTERNATIONAL CHEMICAL WORKERS UNION

BEFORE

SENATE COMMITTEE

ON

LABOR AND HUMAN RESOURCES

APRIL 15, 1980

The following testimony is presented on behalf of the 75,000 members of the International Chemical Workers Union whose efforts to improve their workplace conditions would be severely undermined and whose very lives would be substantially endangered should the mistitled "Occupational Safety and Health Improvements Act of 1980" receive favorable action from this committee. Such action would surely cause the working people of the United States to question whose interests this committee serves. The responsibility for the increased deaths and mutilations resulting from the elimination of Federal safety protection for 90% of U.S. workplaces must clearly be borne by the supporters of the proposed amendment. The constituency which the Intenational Chemical Workers Union represents includes workers who not only are at the highest risk for suffering adverse health effects, but also are exposed to significant safety hazards. Generally, poor maintenance in the chemical industry and the effects of corrosive substances have turned many workplaces into time bombs. The high pressure and temperatures which are common, combined with highly volatile substances, are an invitation to disaster when a plant is poorly maintained or the work force is inadequately trained. We believe that many of these safety hazards are readily identifiable and easily eliminated through the functioning of an effective compliance program. The safety compliance program of OSHA is the only legal recourse which workers have to compel safety hazard abatement and this program is essential for the elimination of health hazards through its referral program. We do not deny that OSHA has not been able to develop the comprehensive inspection program which American workers deserve and were promised. However, we do not see any improvements which would result from passage of Senate Bill 2153, nor can we comprehend how fewer inspections will provide more protection. From our own experiences we will provide testimony to demonstrate that the basic provisions and underlying assumptions of the proposed bill do not reflect either the needs of American workers or the reality of the struggle by workers to improve their working conditions.

Exemptions Under S. 2153

Under this proposed legislation employers would be exempt from safety inspections if they qualified under a scheme establishing a socially acceptable number of deaths or lost workday injuries. This plan would rely on workers' compensation records and employer affidavits.

The use of workers' compensation records assumes that they are readily available and that they are accurately maintained and reflect workplace experience. It also assumes the veracity of employers in reporting injuries for compensation and in recording injuries which are work-related. Even if the inadequacies of the current workers' compensation system were remedied and OSHA were to become actively involved in the collection and evaluation of records, there would be two negative occurances. The severely limited resources of OSHA would be diverted into bureaucratic paper shuffling. The five-million dollars per year price tag proposed for upgrading the claims processing and recordkeeping requirements of this bill are unlikely to underwrite the taxpayer's costs due to the diversity of state programs. The benefits of under reporting and the lack of penalties for violations would provide additional incentives to inaccurate reporting. Numerous recordkeeping violations have been documented through OSHA investigations and through interviews with workers. Because of under reporting, many plants would be exempt until it is time to count the bodies. The American Cyanamid plant in Bound Brook, New Jersey, where there are over 1,000 employees, would have been exempt in 1979 when there was one fatality, one amputation, and an accident resulting in 17 persons being hospitalized. This company has also been cited for willfully exposing its employees to regulated bladder carcinogens. The report of an investigation into the bladder cancers at this facility was included as Appendix I in recent testimony before this committee.

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Voluntary Compliance and Cooperation

Traditionally the International Chemical Workers Union has actively supported the establishment of joint health and safety committees. These committees have been encouraged to collectively identify and abate safety and health hazards. Union committee members are instructed to inform the company of existing hazards in order to eliminate the problem and to develop a non-adversary working relationship. This union policy is based on the right of recourse to OSHA upon the employers procrastination or refusal to abate the hazards. The union's Health and Safety Department is currently providing training for committee members to enable them to function more knowledgeably in recognizing and abating hazardous conditions.

Because of the limited time for this testimony, the results of specific cooperative efforts have not been included, but we are prepared to discuss them.

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Company resistance has taken many forms. The union has been refused basic information such as a list of substances present in the plants, industrial hygiene data, aggregate medical surveillance data, injury and illness records, insurance records, and access to the plant itself. The most frequent justifications for these actions are that the company is already overburdened with outside inspectors and that trade secrets would be jeopardized. Given the current level of OSHA staffing, I doubt that many employers could legitimately claim harassment. Since unions have a vested interest in the economic health of the employer, they are not likely to jeopardize their members' jobs. If trade secret disclosure were a real threat I should think there would be more concern of leaks through an outside consulting program.

Conclusion

In summary, let me state that Senate Bill 2153 which is before this committee is fatally flawed both in its statistical concept and its reliance on voluntary compliance. Should this bill pass, all American workers will suffer and particularly those who are unorganized.

If it is the firm resolve of this committee to improve the Occupational Safety and Health Act, then we encourage it to begin by introducing legislation which would expand OSHA's scope and increase its regulatory and compliance capabilities.

If the committee still believes that voluntary compliance can succeed, then we encourage it to introduce legislation which would provide the incentive for such success. The penalties should equal the crimes. For every injury or death resulting from a violation, the responsible corporate official should be subject to the appropriate criminal penalties.

In closing, the International Chemical Workers Union wishes to encourage the members of this committee to reject Senate Bill 2153 because of the devastating effect which its passage would have on all U.S. workers.

Appendix A

The following transcript of an interview with Ms. Kaffie Owens, member of ICWU Local 218 in Henderson, Nevada, discusses two workplace injuries which, to the best of our knowledge, were never reported by the company as lost-time injuries. Given numerous conversations with other members of the International Chemical Workers Union, we are convinced that her story is not unusual, but in fact reflects corporate practices throughout much of the chemical industry.

Emphasis has been added to draw attention to the particular sections of the transcript that are particularly relevant to the testimony on Senate Bill 2153.

This interview took place on March 27, 1980.

Ms. Owens: My name is Kaffie Owens and I work for Kerr-McGee and I'm in Local (ICWU) 218. When the incidents that I'm telling about (occurred) I worked for Kerr-McGee at the Westend plant in Trona, California, and I think the local is 398. I'm not sure. I went to work one night and my eyes - I had been working in the grainer area where there is some concentration of H_2S gas and a lot of product hot compensate water, and I had been working. I had come in early and I worked four hours. My (regularly scheduled) shift had just come on and I was still working... I had worked the whole time. So I came in to take a break, and when I walked into the room, I notice my eyes started steaming, and I sat down and they got worse. So I got up and I washed my hands and I washed my eyes out and it didn't help any. So I asked one of the men would the plant have any Visine, and they told me to go to the lab, that that's where they kept the eyedrops. I went up there and they put Visine in my eyes and they have bright lights and it made my eyes hurt even worse, so they washed it out with welder's flash.

Interviewer: Who were "they"?

The men in the lab. And then they put boric acid - I think it was boric solution - on it, and by this time I had a raging headache. My eyes were on fire, and I was in tears and I kept begging them to turn the lights out. It seemed like it hurt, but not as bad, if the lights weren't hitting it. So they took me to the first aid room and they called my foreman and he came and he questioned me, "Did anything blow in my eyes, splash, or did I rub them, had I gotten product on them," and I kept telling him "no".

Interviewer: No, you didn't rub your eyes, or that you hadn't had a splash, or anything?

Ms. Owens: That I had not openly contaminated my eyes with anything. So he kept questioning me, and he called the nurse. Well, she couldn't come out. This was like one o'clock in the morning, so she had him call Warren Lawless, who was safety engineer, I think that's what they call him. He told my foreman to send me home and my foreman knew that I just lived with my daughters, and they're pretty small and I would have no way to go home in the first place. Once I got there, if (the eyes) got worse I wouldn't have a way to go to a doctor or get help, and he (the foreman) told him (Warren Lawless) he would not do that. So Warren came in and he questioned me again. And they kept saying something had to have happened. What happened? And I kept telling them that I didn't know. I knew that nothing had blown in my eyes, splashed in my eyes, and I knew I had not rubbed them. So he finally got disgusted and tired and wanted to go home, so he told me that he would take me to the hospital if I would go under my own insurance, but they wouldn't take me under theirs as a work accident. And at this point I really didn't know what was wrong, so I wasn't going to protest, and I just wanted to get to a doctor, and I told them "yes". All the way over there ...

Interviewer: Did you have to sign anything?

Ms. Owens: When we got there I had to sign my own insurance forms before they would even look at me. And after I had done that, well they still had my eyes bandaged, but that's what the nurse told me I was signing - I didn't see it. And the doctor came in and she took one look at my eyes and started examining and told them it was a chemical burn. Well, all at once Mr. Lawless became very, very concerned with my health and welfare, extremely. He stopped and he bought me a coke on the way home and he started to explain to me that if I didn't come in on my regular shift of graveyard, because - well, they had to bandage both eyes; they put medicine in them and bandaged both of my eyes up. At that point I couldn't see anything. And he explained that they would go out of their way to help me, and that they realized that I had kids and had to work and that if I didn't come in, if I stayed home, that the workers wouldn't get these safety points that they get. You get so many (points) if there is no accident; if you have a lost time accident, you don't get them and I would be cheating the people out of all these things they could get at the end of the year. And he said that they would provide, find a way for me to come to work, I would report in to my foreman and it would be up to my foreman; he would either, you know, make me comfortable where I could sleep on the couch there or my foreman could bring me home, depending on what I wanted to do. So the next night they had a fellow worker come and get me. He led me - he had to come in the house, he had to guide me to the car, into his truck, he had to guide me out of his truck to the office and both eyes were still definitely bandaged. And my foreman came in and questioned me again on what had happended and how I felt and we sat there for about ten of fifteen minutes, and he drove me home.

Interviewer: Did you actually punch in at work?

Ms. Owens: No. We did not have time cards. You know, a time clock. We kept track of our hours and our foreman kept track of it. It was just on a trusting basis, both ways, and there was usually no static because we had reliefs that could really verify what time we got there and what time we left. So I guess they just didn't want to go to the expense of a time clock. I don't know why they didn't have one. But I was logged as being there and I got paid my eight hours the whole time. I never lost one minute's pay.

Interviewer: Were you on the plant premises those full eight hours?

Ms. Owens: No. They kept me there (10 - 15 minutes) but there was no place (for me to stay) - it was in the middle of the night, and my foreman then took me on home, and I just stayed on home until they took one of my bandages off. When they took my bandage off, then I came in and they took me down to the maintenance shop and I worked as a secretary, more or less; I filled out all sorts of forms for them.

Interviewer: How long did this go on?

Ms. Owens: I guess it was about a week or two, and finally I couldn't - it hurt my eyes just (as much) sitting there looking and doing all this work as it did if I'd just go ahead and work, and I went back and begged my doctor to take me off the light duty so I could go back to my normal job. And later on my eye wasn't actually dry on me, but I didn't have that much moisture in it, and if the wind blew it was extremely irritating to my eye; it just felt like it was going to pop out. And if I wore goggles where a lot of air couldn't circulate in there, I had a lot of problems. And it would be very irritating at first, then it would turn into a headache. And I was seeing the doctor quite a bit.

Interviewer: Was this the same doctor that you originally went to see?

Ms. Owens: No. The emergency room doctor referred me to the eye doctor at the hospital there.

Interviewer: Does that eye doctor also concur that the eye problems were related to chemical exposure?

Ms. Owens: Yes. So I went to him and I told him the problem I was having with goggles, and he didn't know exactly why I was having the problems, but I was having the problems. So he wrote a slip saying that I didn't have to wear them because my job at that time, I had to go down underneath the lime kiln. They have this pit and you have to shovel lime and it's very caustic, I guess is the word, and it was also very dusty, so we had to wear goggles. And so with that there, I wouldn't have to go down there with the goggles. And the nurse, they didn't like it, so the nurse called up the doctor.

Interviewer: This is the company nurse calling the outside eye doctor?

Ms. Owens: Right, to find out what the problem was. And the personnel manager whose name was Bill Doud at the time, he told me that he realized I had a family to support and they appreciated what happened and they were sorry about the mixup in making me go under my own doctor. But they had been more than fair to me because they paid me for all this time, and they had paid my doctor bills.

Interviewer: They did pay your doctor bills, even though you signed your own (insurance form) initially.

Ms. Owens: Right. As soon as they found that out, they knew that the union would throw a fit, so they switched over to their insurance. There was a lot of hassle and that with the hospital records, but they did pay for it. And in the course of the conversation, he told me that they didn't want to hurt me or cause me any bodily harm and that if I didn't stop complaining about the goggles, that they would have to fire me for my own good; that they would actually be doing me a favor. And that really got to me. It was about a month later, after I had got off this light duty, (that) I was back to my job of work where they had put me on the grainers; and I was working one night on graveyard and I noticed a hole in the grainer, up on the catwalk above the grainers. And I reported it to my foreman, and (he) supposedly had wrote up a maintenance work sheet to have it fixed. And I had two days off, so I came back on swing shift (two days later) and it was getting dusk and I had to work right around that area, and I never thought to look to see if the hole was still there. And the hole was just big enough for my boot to go through. And when I stepped down, I stepped right into the hole and I bummed my knee. And this time again - well, they didn't even send me to the doctor this time. They told me that heat and ice would do it - ice, and then keep putting heat on it, and they gave me a pair of crutches because I couldn't put any weight on it.

Interviewer: Who's "they"?

Ms. Owens: The (Plant) nurse and Warren Lawless. And so, for a week I would go in, hobble in on my crutches and they would give me a heat treatment and then I would hobble on down with my crutches, down to maintenance. And I was back to being a secretary again.

Interviewer: So how long were you out of your normal job from this injury?

Ms. Owens: Two weeks.

Interviewer: And was that reported as a lost time accident?

Ms. Owens: No. It wasn't even really reported as anything more than first aid, because they told me I didn't need to go to a doctor. And I was having so much static over the other thing (eye injury), I was afraid to ask to go to the doctor. So I didn't. I just trusted them that my knee wasn't going to give me problems later in the year (and) that nothing was torn or broke. And we Ace bandaged it...I know that it was (listed as) nothing more than first aid, that it wasn't even listed (as a work-related accident), even though I was on light duty.

Interviewer: Are you on the Health and Safety Committee. What is your (union) position?

Ms. Owens: I'm a trustee, but I fill in for the recording secretary, because he's having quite a few problems and he doesn't make it to that many meetings. And I'm an alternate on the Safety Committee, because we're trying to - we only have three (committee members), and we keep one in each area of the plant...

Interviewer: So, do you actually look at the logs and records that the company keeps on lost time accidents?

Ms. Owens: As far as I know, nobody on the Health and Safety Committee even sees them. Every once in a while my foreman - like, if we have a Safety Huddle every Friday and he will go into the lunch room right after lunch and he'll read us something that he thinks is pertinent, like one time it was how to boost a battery, another time telling us how to climb up and down ladders and to watch out for carbon monoxide poisonings, another one. And we also go over what has happened at the plant that week. And every once in a while, he'll have a copy of one of the accidents, but he'll just read off the name and generally what happens...

Interviewer: So how do you know that the company didn't ever report both of those lost time accidents?

Ms. Owens: On me?

Interviewer: Yes.

Ms. Owens: Because we have a big board that says how many days it's been since a lost time accident, and the numbers didn't go down. They just kept going up. And I know on the other report that they didn't list my knee. I saw the accident report; it said something about whether I had seen a doctor. And if you don't see a doctor, they don't turn (the report) in. Because the answer was "no" on the (question about seeing a) physician, it is not even turned in as a real accident.

Interviewer: You did see the accident reports?

Ms. Owens: Yes. I have a copy of my accident report on my eyes, and I also have the statement that the foreman filled out stating everything I said.

Interviewer: When was this?

Ms. Owens: This was around the thirteenth of March of 1978.

Appendix B

17

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Complainant

-vs-

JOHN-MANVILLE SALES CORPORATION

Respondent

OSHRC 79-6345
Docket No.

COMPLAINT

Complainant, RAY MARSHALL, Secretary of Labor, United States Department of Labor, brings this action against respondent, JOHN-MANVILLE SALES CORPORATION, for an order affirming the Citation and Notification of Penalty No. 1 issued as a result of violations of section 5(a)(2) of the Occupational Safety and Health Act (29 U.S.C. 651, et seq.), hereinafter called the Act, and regulations under the Act.

I

Jurisdiction of this action is conferred upon this Occupational Safety and Health Review Commission by section 10(c) of the Act.

II

(a) Respondent, JOHN-MANVILLE SALES CORPORATION is, and at all times hereinafter mentioned was, a corporation, with an office and place of business at Greenwood Avenue, Waukegan, Illinois and at all times hereinafter mentioned, it was engaged in the business of manufacturing building materials.

(b) Respondent at all times hereinafter mentioned had a workplace at Greenwood Avenue, Waukegan, Illinois, where it was engaged in the business of manufacturing building material.

III

(a) Respondent at all times hereinafter mentioned was engaged in a business affecting interstate commerce in that respondent was engaged in handling goods which had been moved in interstate commerce.

(b) Respondent at all times hereinafter mentioned was an employer employing employees in said business at the aforesaid workplace.

IV

(a) Respondent, at the aforementioned workplace on or about May 1, 1979 to October 24, 1979 violated section 5(a)(2) of the Act and the following occupational safety and health tandard(s) duly promulgated pursuant to section 6 of the Act, as set forth in Exhibit A.

On October 30, 1979 pursuant to section 9(a) of the Act, the complainant issued to the respondent, by mail, the aforesaid Serious Citation and Notification of Penalty No. 1 charging the respondent with violation of the Act with respect to each of the aforesaid items.

Said Serious Citation and Notification of Penalty No. 1 fixed an abatement date for each of the aforesaid items, as set forth in Exhibit A. For each of the aforesaid items, the date fixed was reasonable in that it allowed the respondent sufficient time to abate the violation alleged herein.

(b) The violation referred to in paragraph IV(a) Exhibit A hereof constitute a serious violation within the meaning of section 17(k) of the Act, in that there was a substantial probability that death or serious physical harm could result and the respondent knew, or with exercise of reasonable diligence could have known, of the presence of the violation.

On October 30, 1979 pursuant to section 10(a) of the Act, the complainant issued to the respondent, by mail, the aforesaid Serious Citation and Notification of Penalty No. 1 which proposed the assessment of a penalty for each of the aforesaid item, as set forth in Exhibit A. The amount of each such proposed penalty is appropriate and reflects due consideration of the size of the business of the employer, the gravity of the violation alleged, the good faith of the employer, and the history of previous violations, if any, as required by section 17(j) of the Act.

On November 9, 1979, pursuant to section 10(c) of the Act, the respondent duly filed, by mail, with a representative of the complainant, a notification of intent to contest stating an intent to contest the aforesaid Serious Citation and Notification of Penalty No. 1 and the penalties proposed therein; and said notification of intent to contest was thereupon duly transmitted to this Occupational Safety and Health Review Commission.

V

Respondent employed approximately 1100 employees at the aforesaid workplace who were affected by the violation alleged in paragraph IV(a) above.

WHEREFORE, cause having been shown, complainant prays for an order affirming the aforesaid Serious Citation and Notification of Penalty No. 1 and the penalties in the amount proposed therein.

CARIN ANN CLAUSS
Solicitor of Labor

HERMAN GRANT
Regional Solicitor

Rafael Alvarez
RAFAEL ALVAREZ
Attorney

Attorneys for Ray Marshall,
Secretary of Labor, United
States Department of Labor,
Complainant

P. O. ADDRESS:
Office of the Solicitor
U.S. Department of Labor
230 South Dearborn Street
8th Floor
Chicago, Illinois 60604
Telephone: 312/353-1144

NOTICE TO RESPONDENT

The respondent is hereby notified that Rule 33(b) of the Rules of Procedure of this Commission requires that the respondent, within 15 days of receiving this complaint, file an answer to this complaint either admitting or denying each allegation of this complaint. Failure to do so may result in the entry of an order by default against the respondent, dismissing the respondent's notice of contest and granting the relief prayed for in the foregoing complaint. The original of the answer must be filed with Occupational Safety and Health Review Commission, 1825 "K" Street, Northwest, Washington, D.C., 20006; and a copy of the answer must be served on the abovenamed attorneys for the complainant at the abovenamed address.

NOTICE TO AFFECTED EMPLOYEES

An affected employee must comply with Rule 20 of this Commission if he wishes to participate in this proceeding as a party.

CERTIFICATE OF SERVICE

I certify that four (4) copies of the foregoing COMPLAINT have been served on respondent this 29th day of November, by sending the aforesaid copies by certified mail, return receipt requested, to:

Dennis H. Markusson
Associate General Counsel
John-Manville Corporation
Ken Caryl Ranch
P. O. Box 5723
Denver, Colorado 80217

Rafael Alvarez
RAFAEL ALVAREZ
United States Department of Labor
One of the Attorneys for
Complainant

CITATION and NOTIFICATION OF PENALTY

U.S. Department of Labor - OSHA
344 Smoke Tree Business Park
North Aurora, Illinois 60542

TYPE OF VIOLATION(S)	CITATION NO.
SERIOUS	1

10/30/	J0514	05r
REGION	AREA	PAGE
05	0460	1 OF 2

INSPECTION DATE:
03/01-10/24/79

INSPECTION SITE:
Creswood Avenue
Waukegan, IL 60085

TO: Johns - Manville Sales Corporation
Creswood Avenue
Waukegan, IL 60085

THE LAW REQUIRES that a copy of this Citation be posted immediately in a prominent place at or near the location of the violation(s) cited below. The Citation must remain posted until the violations cited below have been corrected, or for 3 working days (excluding weekends and Federal holidays) whichever is longer.

PENALTIES ARE DUE WITHIN 1 DAYS OF RECEIPT OF THIS NOTIFIC UNLESS CONTEST (See enclo Booklet)

This Secti Be Detach Before Pa

This citation describes violations of the Occupational Safety and Health Act of 1970. The penalty(ies) listed below are based on these violations. You must correct the violations referred to in this citation by the dates listed below and pay the penalties proposed, unless within 15 working days (excluding weekends and Federal holidays) from your receipt of this citation and penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. (See the enclosed booklet which outlines your responsibilities and courses of action and should be read in conjunction with this form.)

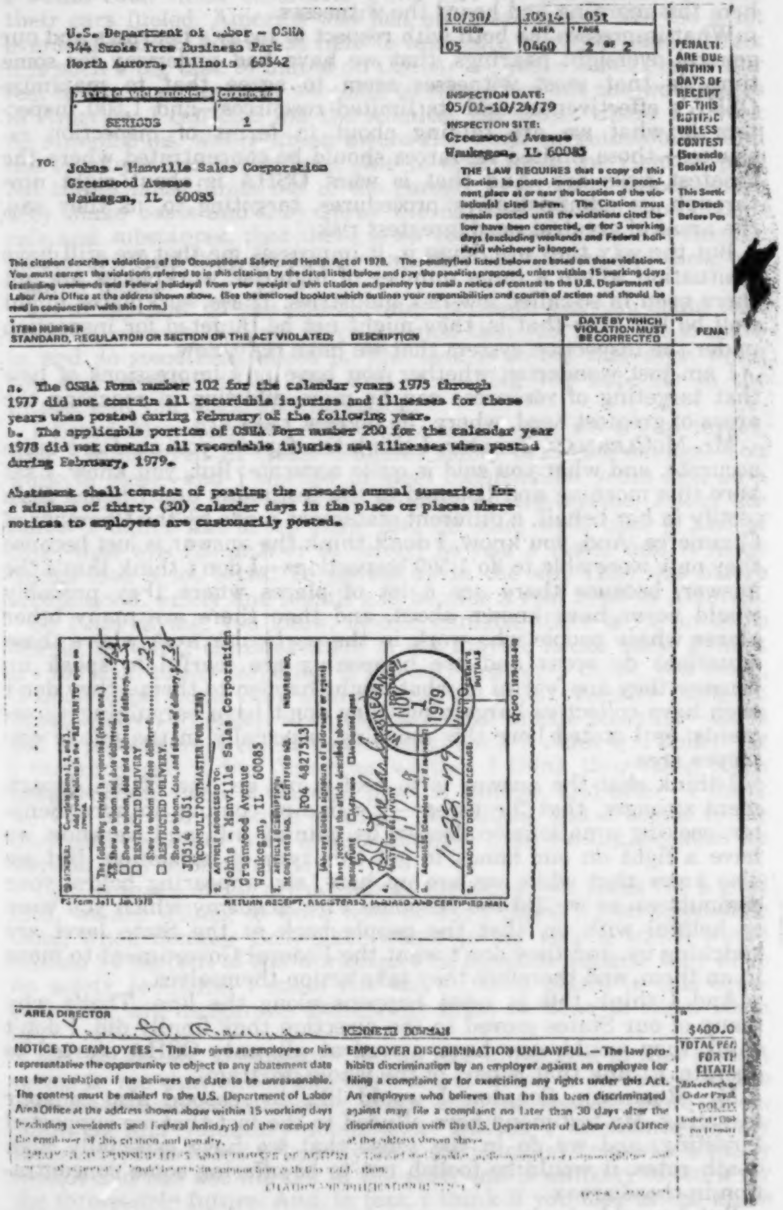
ITEM NUMBER STANDARD, REGULATION OR SECTION OF THE ACT VIOLATED: DESCRIPTION	DATE BY WHICH VIOLATION MUST BE CORRECTED	PENA
The violations described in this citation are alleged to have occurred on or about the day the inspection was made unless otherwise indicated within the description given below.		
1 29 CFR 1904.2(a): Each recordable injury or illness was not entered on the log (OSHA Form number 100 or 200) no later than six working days after receiving information that a recordable injury or illness had occurred: Recordable occupational illnesses (e.g. pneumoconioses) for the calendar years including but not limited to 1975 through 1979 were entered on the log as long as four years after their diagnoses.	IMMEDIATELY	100
2 29 CFR 1904.4: A supplementary record for each recordable occupational injury or illness (OSHA Form number 101 or equivalent) was not available for inspection within six working days after receiving information that a recordable injury or illness had occurred: The supplemental record for recordable occupational illnesses (e.g. pneumoconioses) for the calendar years including but not limited to 1975 through 1979 were prepared as long as four years after their diagnoses.	IMMEDIATELY	100
3A 29 CFR 1904.5(b): The annual summary of occupational injuries and illnesses (applicable portion of OSHA Form number 200 and OSHA Form number 102) for the previous year was not completed prior to February 1: a. All recordable injuries and illnesses for the calendar years 1975 through 1977 were not entered on the OSHA Form number 102 by February 1 of the following year. b. All recordable injuries and illnesses for the calendar year 1978 were not entered on the applicable portion of the OSHA form number 200 by February 1, 1979.	11/9/79	200
3B 29 CFR 1904.5(d): The annual summary (applicable portion of OSHA Form number 200 and OSHA Form number 102) covering the previous calendar year was not posted by February 1:	11/9/79	

AREA DIRECTOR
KENNETH BOWMAN

TOTAL PE FOR T CITAT

NOTICE TO EMPLOYEES — The law gives an employee or his representative the opportunity to object to any abatement date set for a violation if he believes the date to be unreasonable. The contest must be mailed to the U.S. Department of Labor Area Office at the address shown above within 15 working days (excluding weekends and Federal holidays) of the receipt by [illegible]

EMPLOYER DISCRIMINATION UNLAWFUL — The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he has been discriminated against may file a complaint no later than 30 days after the discrimination with the U.S. Department of Labor Area Office at the address shown above.



U.S. Department of Labor - OSHA
344 Smoke Tree Business Park
North Aurora, Illinois 60542

10/30/	J0514	051
REGION	AREA	PAGE
05	0460	2 OF 2

TYPE OF VIOLATION(S)	CITATION NO.
SERIOUS	1

INSPECTION DATE:
05/01-10/24/79

INSPECTION SITE:
Greenwood Avenue
Waukegan, IL 60085

TO: Johns - Manville Sales Corporation
Greenwood Avenue
Waukegan, IL 60085

THE LAW REQUIRES that a copy of this Citation be posted immediately in a prominent place at or near the location of the violation(s) cited below. The Citation must remain posted until the violations cited below have been corrected, or for 3 working days (excluding weekends and Federal holidays) whichever is longer.

PENALTI ARE DUE WITHIN 1 DAYS OF RECEIPT OF THIS NOTIFIC UNLESS CONTEST (See enclo Booklet)

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ITEM NUMBER STANDARD, REGULATION OR SECTION OF THE ACT VIOLATED; DESCRIPTION	DATE BY WHICH VIOLATION MUST BE CORRECTED	PENA
a. The OSHA Form number 102 for the calendar years 1975 through 1977 did not contain all recordable injuries and illnesses for these years when posted during February of the following year. b. The applicable portion of OSHA Form number 200 for the calendar year 1978 did not contain all recordable injuries and illnesses when posted during February, 1979. Abatement shall consist of posting the amended annual summaries for a minimum of thirty (30) calendar days in the place or places where notices to employees are customarily posted.		

SENDER: Complete items 1, 2, and 3. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one.)
☒ Show to whom and date delivered
☐ Show to whom, date and address of delivery
☐ RESTRICTED DELIVERY Show to whom and date delivered
☐ RESTRICTED DELIVERY. Show to whom, date, and address of delivery
J0514 051
(CONSULT POSTMASTER FOR FEES)

2. ARTICLE ADDRESSED TO:
Johns - Manville Sales Corporation
Greenwood Avenue
Waukegan, IL 60085

3. ARTICLE DESCRIPTION:
REGISTERED NO. | CERTIFIED NO. | INSURED NO.
P04 4827513

(Always obtain signature of addressee or agent)

I have received the article described above.
SIGNATURE ☐ Addressee ☐ Authorized agent

4. DATE OF DELIVERY 11/1/79

WAUKEGAN NOV 1 1979

5. ADDRESS (Complete only if requested)

11-23-79

6. UNABLE TO DELIVER BECAUSE:
CLERK'S INITIALS

PS Form 3811, Jan. 1979 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

AREA DIRECTOR
KENNETH DOWMAN

$400.0
TOTAL PEN FOR TH CITATI

NOTICE TO EMPLOYEES — The law gives an employee or his representative the opportunity to object to any abatement date set for a violation if he believes the date to be unreasonable. The contest must be mailed to the U.S. Department of Labor Area Office at the address shown above within 15 working days (excluding weekends and Federal holidays) of the receipt by the employer of this citation and penalty.

EMPLOYER DISCRIMINATION UNLAWFUL. — The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he has been discriminated against may file a complaint no later than 30 days after the discrimination with the U.S. Department of Labor Area Office at the address shown above.

The CHAIRMAN. Thank you, Mr. Eller. I know that you were all here this morning and heard the witnesses.

What impresses me both with respect to today's hearings and our general oversight hearings, that we have had underway for some time, is that most witnesses seem to agree that to maximize OSHA's effectiveness and its limited resources—and 1,500 inspectors is what we are talking about in terms of inspection resources—those limited resources should be concentrated where the greatest risks are. And that is what OSHA is about right now through its administrative procedures, targeting to, as they say, the areas of greatest need, greatest risk.

But the way they are doing it, it impresses me that we still have a situation where a large number of high-risk workplaces are out there even in so-called low-risk industries. These workplaces might well be left out—that is, they might not be targeted for inspection under the inspection system that we have right now.

I am just wondering whether you have any impressions of how that targeting of resources can be more effective in reaching the areas of greatest need, where the highest risks are.

Mr. MCCLENNAN. Senator, I think the figures you used are quite accurate, and what you said is quite accurate. But, you know, I sat here this morning and listened to the testimony and I heard Eula testify in her behalf, a different statement made by the Chamber of Commerce. And, you know, I don't think the answer is just because they only were able to do 1,500 inspections—I don't think that's the answer, because there are a lot of places where they probably would never have known about, and then there are many other places where people who work in the particular area where these situations do occur and are happening are fearful to speak up because they are fearful of what might happen to them—they don't even have collective bargaining, they don't have bargaining agreements, as I stated here this morning, especially in the public employee area.

I think that the answer is to beef it up, get the OSHA department stronger, that the threat—it's like us coming up here, Senator, seeking a national collective bargaining bill, and we know we have a fight on our hands to get this type of legislation. But we also know that while we are up here, sir, appearing before your committees, as we did the National Fire Academy which you were so helpful with us, that the people back at the State level are watching us, and they don't want the Federal Government to move in on them, and therefore they take action themselves.

And I think this is what happens along the line. That's why many of our States moved in the direction they finally did. I don't think they would ever have moved at all, only OSHA started to operate. I think that is part of the whole program.

Mr. ROBINSON. Senator, I would like to respond also to your targeting. My testimony here alluded to the fact that we supported targeting, and we do in the sense that we have especially high death rates, it would be foolish not to be offering some concentration in those areas.

But I would give you my experiences as a labor representative and as a worker. I think America up to 1970 had to be a very unsafe place for a worker, and I would cite all industries, including

I would even think customers going into the gas station to have their cars fueled. America was just an unsafe place. We did a lot overseas and not too much here to take care of people, and I think it is such a big task to unfold on OSHA—10 years is not even a fair test to say how far have we come to straighten out the workplaces in America. I can cite you the smallest job shops, where we work on automobiles, where union mechanics work on automobiles, and the employer has never been able to offer them the right to pipe out the exhaust fumes out of the garage. I can go to places where they make boats and they spray the darndest plastic type chemicals and substances, that there is no ventilation—they are smaller employers. And they are deadly and they are killers, and these are smaller places.

So to say how do you concentrate—perhaps, yes, you could look at death records, because that's a signal that you have got to move in and do something about it. The task is so big that even when you say "target," that's the kind of a thing you hope for in the future, and you work with targeting.

I heard Mrs. Bingham talk today about, yes, we try to target. And I think even in colder climates safety problems change. You work in steel—and I worked in steel construction years ago, as a very young boy, and we were walking on the beams; I told the fellow I didn't like it up here, and he said, well, take a puff of this—that was his answer to safety, he had a reefer and it made things look a lot better 20 stories up in the air. That was before occupational safety and health had become a real issue in America.

So I am saying, you know, in cold climates there is ice on those beams, in warm climates there is not maybe; it can vary. I think it's too soon to say targeting is the only answer. I think, you know, it takes time. Some may quarrel with me about America being an unsafe place—I happen to think it's a most unsafe place for—and I call it passengers, I call it pedestrians, I call it John Q. Public, and I certainly call it the American worker. I think they faced more hazards than—well, I traveled most of Europe, and after—I think we won the war a couple of times over there, and it seems to me they still come out with a safer country than we did, because we were so busy making money.

I guess that's about my answer to targeting. We think it's a good idea, we are willing to work with it, but I think it's an impossible thing when Senator Schweiker wants to say target, which would release 94 percent of the workplaces in America because they have no safety problems. I could cite the smallest places in this country—they are dangerous. Something must be done to clean them up.

Mr. **Eller**. Mr. Chairman, I would like to respond to that also. It seems to me that one of the basic issues which is embodied in the Schweiker amendment really deals with the concept more of exemptions and voluntary compliance. But as I mentioned in my testimony, it is based primarily on a statistical system which really cannot and has not worked in the past, and is unlikely to work for the foreseeable future. And, in fact, I think if you look at the kinds of statistics which were being presented by Senator Schweiker even this morning in regards to two out of three inspections having misfired—I haven't looked specifically at all those statistics, but just let's look briefly at what the real process is in which targeting goes on, because when you are looking at violations that result in citations, the actual citations which are used in the statistics do not reflect the process which goes on through the inspection, and that is that once an inspection occurs there are several levels of negotiations which actually go on between the employer and between OSHA and between the employer and the solicitor's office prior to when those citations are ever cemented and either become an order in which the employer must abate, or until it's finally challenged and goes to the review commission, which means that many of the serious violations which ultimately might be reduced to other violations really don't reflect what you see in the workplace, because one of the things that is there is that there is a negotiation process there as well and that those violations do not reflect actually what you see in the workplace.

Another example in terms of targeting—targeting is a very useful tool, but it is essential that if you are going to target that you have good statistics, and I think one of the things which we have tried to develop within the Chemical Workers Union, and which we have made a central part of our training program, is to indeed focus on good recordkeeping as well, the preparation of complaints which are submitted to OSHA—and this is also a critical issue, because as workers become more astute in filling out complaints, I think, one, you are going to see OSHA being able to do a targeting based on the kind of complaint which they receive, which means that you don't simply have to take them and look at which ones are likely to present serious violations and which ones are not. I think that the result of educational programs is going to increase the number of citations which are serious citations and will increase the number of inspections which result in violations related to the complaints, because I think as workers become more astute they will see the problems, they will be able to articulate them on the complaint, and those will then be reflected in the citations.

The Schweiker amendment will throw that completely out, because what it would state is that all of the work which goes into looking at the hazards which exist, and in terms of bringing them to the attention of the companies, one would again change your statistical basis for looking at where your most hazardous industries are, because those serious violations then would never be reported at all.

The other thing is that when you look at the statistics which say that injuries and illnesses are increasing, I think that the statistics will continue to show an increase in injuries and illnesses simply because of the fact that we are getting better and better reporting. And I think that as workers begin to watch those records and as they begin to see where the violations and the underreporting and the omissions are that you are going to see the statistics increase in terms of injuries and illnesses, not because there are more injuries and illnesses but because of better recordkeeping.

And I think that the basis right now to embark on a system whereby you would exempt workplaces with the data that we have now is seriously misguided.

I would also like to have our legislative representative make a comment to this point, because he came out of a local plant just recently and can talk very extensively about the work that went on there.

The **Chairman.** Mr. Marlowe, if you will identify yourself for our record.

Mr. **Marlowe.** Ernest Marlowe, from the Chemical Workers. A little more than a year ago—up until that time I worked in a plant and I worked there 19 years. It happened to be a Lever Brothers plant in Baltimore, Md. There happens to be one in your district, too, or in New Jersey—we negotiated on a combine level—and one in California and one in St. Louis.

We had joint safety committees, active joint safety committees that operate. The safety committees have been trained that, yes, they go to the company and try to solve the problem. If you can't do that in some reasonable time period, then they go to OSHA and file a complaint.

But what I really wanted to talk about is the records and the recordkeeping and what happens, when you talk about in the Schweiker bill, when it talks about lost time accidents. In our particular plant, they have a system if you are hurt on the job you then—say you break your arm, and I will just use an example, if you break your arm, it happens to be on the night shift, there's no permanent doctor there—there were about 850 employees, so there is no doctor there all the time, but there is a nurse around the clock. If an employee hurt his arm, he went to the nurse, the nurse might say to him, OK, go to the hospital, I think it's broken. They might send him to the hospital with another employee in a taxicab or maybe call an ambulance, depending on the severity. At that point they would go to the hospital, they might get a cast on their arm—we use that same example—they come back to the plant. The hospital doctor who treated him in the emergency room might say, OK, take off 3 days, or take off 4 days. They come back to the clinic, give the slip to the clinic nurse, the clinic nurse would say, OK, report in to see the company doctor tomorrow morning. The doctor is in from 10 to 12, come in tomorrow and see the doctor.

The employee then comes into the plant the next morning, sees the company doctor, and the company doctor then says we have adjusted work—that is what we call it there, some plants call it light work—and they say, we have adjusted work, and they have a whole area set aside in the warehouse where they send that guy over to the warehouse and sit there and scrap soap. That means they take the wrapper off of soap, if they can; if they can't, they are certainly not pushed to do anything—but they take the wrapper off soap, throw the wrapper one place and throw the soap somewhere else. That is scrap soap, because it is going to be fed back into a system. And we maintain a number of those people, and there is not a lost-time accident involved in that, more than 2 days, as the Schweiker bill. But I don't know what you call a serious accident, if a guy breaks his arm—that could happen. We have had a number of people come in the plant with crutches. I spent 19 years there. I happened to be president of the union the last 10 years. During that time, remember, they are getting full pay. Under Maryland compensation law you are only getting two-thirds of your pay. So it's an encouragement to come to work.

Later on we negotiated full pay where the company makes up the difference between the compensation, two-thirds—and now they pay full pay. And certainly the employees are going to be more apt to not go on adjusted work and say I am going to fight you in the compensation board.

If the company doctor says go to adjusted work, that you are able to do that, scrapping soap or sitting on your butt all day, then the company might—if you do take off as that doctor has told you in the hospital, for whatever reason, then they say we have got a disagreement and you will have to settle to get your pay by going to the compensation board. So you are not entitled to that until you go to the com board and prove to the compensation board that you are entitled to pay.

So they are doing it now. If this bill passes, they are going to be doing more and more, and all companies are going to be doing it, and they are going to be forcing those employees to either come into the plant or wait and not get any pay until they get in front of the compensation board, whatever State it is, which might take a month, 6 weeks, or whatever—to get in front of that compensation board so they can get paid. And we see that happening if this bill passes, we don't see any benefits in that.

If you are going to target, the best way to target is deal with—the same way our union is trying to, is educate health and safety committees, let them deal with the company, but don't take that hammer away from them, because if the company doesn't listen they have got to have somewhere to go. And right now they can go to OSHA and file the complaint. And I think it is important again that when they file the complaint about one particular thing, that that slips over the company's head, that OSHA can then come in and do a whole wall-to-wall inspection. And that bill takes that away, too.

So you are more apt to get that voluntary compliance with the company—I mean with that union safety committee, if that threat is over their head.

So I hope you don't take that away. Thank you.

The **Chairman**. Thank you. Let me just have this clarified. On an adjusted work program after an injury, the company pays the wages, but at a reduced rate?

Mr. **Marlowe**. No, at a full rate.

The **Chairman**. And the two-thirds you mentioned that's workers' compensation?

Mr. **Marlowe**. That's the comp part. And that is happening all over the country, so if they can get the worker to come in the plant and get full pay, then it is not reported as lost time.

The **Chairman**. And the incentive for the company to do this is to avoid increases in the workers' compensation insurance rate, I suppose.

Mr. **Marlowe**. Certainly the insurance rate. And they get something out of it: if you are able to scrap that soap and throw the paper in one barrel and the soap in the other, then they take that out and put it back in process. Somebody is going to have to do that.

The **Chairman**. Is this true in your experience in the Machinists, George?

Mr. **Robinson**. Senator, that is true, it is constantly happening where the company will send a taxicab out and bring an employee to work. They will fire an employee who refuses to come to work—I have seen that happen, we have arbitrated those cases. We have had to have medical testimony, a couple of doctors' testimony—demanding that a person who had a broken leg come to work. And it's not just a once-in-a-lifetime happening, it's a continual happening. It's just as my companion here says, they operate, of course—they save money with the insurance companies.

The first thing they do, before they even go that far, is that if there is an area where they could possibly persuade everybody to think that the injury did not occur at all, did not occur on the job, was not a job-related injury, they want to pay you sick leave out of your sick leave bank—they fight you tooth and nail before the compensation board without an injury to preserve their no-accident status with the insurance company.

The **Chairman**. Now coming over to the matter of public employees, President McClennan, we know that Federal OSHA does not apply to public employees.

Mr. **McClennan**. That's right.

The **Chairman**. And you have indicated where the substance of OSHA can and does apply, and that is where the OSHA is under a State plan, right?

Mr. **McClennan**. Right, that's right, Senator.

The **Chairman**. Now, does OSHA apply fully in those cases under State plan? Does the State plan in order to be qualified pick up all of OSHA regulations?

Mr. **McClennan**. No, in fire fighters—the answer is "Yes," Senator.

The **Chairman**. There is a gap here, however, because you are still waiting for specific regulations on the fire brigades, right?

Mr. **Duffy**. Well, we have specific standards in five States I believe right now for fire fighters—California, Washington,——

The **Chairman**. They are all State plan States?

Mr. **Duffy**. Yes, they are.

The **Chairman**. So they pioneered regulation in this area, but Federal OSHA is coming on with regulations which you are waiting for.

Mr. **Duffy**. For the private industrial fire brigades.

The **Chairman**. But will that apply——

Mr. **Duffy**. Yes, it will.

The **Chairman** [continuing]. Under State plans for firefighters in the public employ?

Mr. **Duffy**. Section 18 requires that under a State plan agreement Federal regulations must be applied, Federal regulations or at least as effective ones, with respect to regulations that apply to private sector must also apply to the public sector in the State plan States.

The **Chairman**. Whatever is done here under law would filter through to the State plans, is that right?

Mr. **Duffy**. Yes, it will.

The **Chairman**. Let me ask you this. Where your constituency, public employee firefighters are in a State where there is a State plan, would you compare those States' response to their complaints with the response made to the complaints of firefighters in States that don't have a State plan, therefore they have no OSHA? Is there more responsiveness, in terms of the employees reaction, whether it is the municipality or not, in the State-plan States?

Mr. **Duffy**. There certainly is.

The **Chairman**. There is more responsiveness.

Mr. **Duffy**. The firefighters in the State of California are probably the best-protected fire fighters in the country, all because of the State law. They wear better protective equipment. Some of the equipment that Tom has displayed is not even allowed to be worn there; they are mandated to wear positive pressure breathing apparatus, much, much better equipment, and it's all because of the State law, because they are under the State OSHA program.

The **Chairman**. So now once the regulations for firefighters come out, Federal regulations——

Mr. **Duffy**. Twenty-four States will have such a standard.

The **Chairman**. Immediately. And complaints——

Mr. **Duffy**. We don't necessarily know if it will be immediately, but we——

The **Chairman**. Well, you will have a standing to complain and go through the process of having that complaint processed.

Mr. **Duffy**. That's correct.

The **Chairman**. For example, the equipment—this is going to be in the Federal standards, am I right?

Mr. **Duffy**. Yes, it will.

The **Chairman**. The nature of the equipment firefighters use. Very, very helpful, all of you. Senator Nelson?

Senator **Nelson**. Thank you, Mr. Chairman, no questions.

Mr. **Marlowe**. Senator?

The **Chairman**. Yes, Mr. Marlowe.

Mr. **Marlowe**. Could I just make—really, the brother brought it to mind, when he talks about the company not claiming under workmen's compensation or encouraging the employees not to claim under workmen's compensation, and paying them under their standard S and A, or sickness and accident benefits. It's so difficult to tell, because you have got to deal with each State's workmen's compensation law, as you know, because you have got a Federal compensation law in now to try and at least standardize some things. But right now in Maryland—and certainly all States are not like this—I could be working a job—and I use examples again—where I pick up a hundred-pound bag all day, and that is part of my regular job. And if I hurt my back on that particular job, picking up that hundred-pound bag, and that is part of my regular job, then that is not workmen's compensation or an accident under Maryland's compensation law; it has to be something unusual.

So I can't even claim in Maryland because it has to be a result of an accident or something unusual—so I can't even claim that I had an accident and hurt my back in Maryland; I have to file under either sickness, which is really difficult to prove in Maryland—occupational disease because of picking up the bag—and in most cases the employee, if they go downstairs and say it happened as a regular part of my job and I had a back injury, then they are covered under S and A, or their regular insurance, not under workmen's compensation—they can't even file a claim under workmen's comp. Now, that is the Maryland law. I am not sure of every State law; each one is different. Maybe Jersey is a better law or a worse law, I am not sure.

The CHAIRMAN. Well, I know what you described would be an accident under New Jersey law.

Mr. MARLOWE. Well, it's not under Maryland law, unless it is something unusual. If normally all day I picked up a hundred-pound bag and they came down a conveyor line and I stacked them, if I hurt my back and I didn't slip, fall, or the bag weighed 50 pounds and it made me jerk unusually, then it is not an accident in Maryland under workmen's compensation law.

How are you going to separate those things in this bill? I don't know that.

The CHAIRMAN. You made a good point.

Mr. MARLOWE. You had better look at all the workmen's compensation laws in 50 States and see how you are going to do it.

The CHAIRMAN. Very good point. I know under our law in New Jersey, a worker goes to the water fountain and bends over to get a drink of water, his back goes—that's an accident on the job.

Mr. MARLOWE. Not in Maryland.

The CHAIRMAN. Well, we take Wisconsin as being pure. This all started, this workers' compensation, in the State of Wisconsin, and we apply it in its purest state.

Mr. HERZ. Mr. Chairman, may I add one last comment, please?

The CHAIRMAN. Mr. Herz.

Mr. HERZ. In regards to the firefighters—I am certainly not slighting the other union representatives here—but there is another underlying factor that we, as firefighters, would wish you would consider, and that is that should we be forced to wear and operate with inadequate equipment, there is another more tragic thing to think about, and that is as firefighters should we enter a building, and we have equipment such as I was forced to wear, and which firefighters today are still wearing, be subjected to a great deal of heat and not be able to proceed further with our job of attempting to effect a rescue—should our regulator on our air mask become defective in that same process, it is not just the fire fighter who is subjected to the possibility of becoming injured or have his health impaired because of this equipment, but it is also having an effect on every citizen in this country. God forbid, should we go into a building and have a regulator fail on us and have someone die because we cannot proceed further because of inadequately designed equipment.

So it is not just the firefighters that we are necessarily pleading for; it is for the life and the safety of every person that we are sworn to protect in this country. And we would certainly hope that you would give that some consideration as well.

I thank you for the opportunity.

The CHAIRMAN. Thank you, Mr. Herz. Senator Nelson?

Senator NELSON. Just for clarification on the point—what is your name, sir?

The CHAIRMAN. Marlowe.

Senator NELSON. Mr. Marlowe. You used the example of the individual who broke an arm who was told by the company doctor the next morning that he could go over and handle scrap soap. I just want to make this clear—if he said, no, I don't feel up to it, then are you saying that he would draw—what are you saying happens to him then?

Mr. MARLOWE. Well, we have had a number of cases where the doctor says that and the employee might say, no, I am not going to go over there; I am going to go off like the doctor who treated me said I should. Then the company takes the position that they question your claim under workmen's compensation, and you are not entitled to any pay until you get to the workmen's compensation board.

Now, right now, presently, if he did go over, he would get full pay; if he goes out, he gets full pay. But that wasn't always true, because in Maryland and a number of other places you will find this—in Maryland they pay two-thirds of the Maryland average, which right now is somewhere around $200 a week, maybe a little more than that. If the employee is making $300 a week, to go out sick under workmen's compensation because of an illness, he loses money. So it is certainly an incentive for him to come in and do some adjusted work because he is going to make more, because they are paying him full pay. That's an example that can happen all around the country. I don't know any State, even New Jersey, where they pay 100 percent for being out on compensation.

So certainly it is an encouragement for that employee to come in on what we call adjusted work and some other companies call light work. That happened in my plant, and it happens throughout our union, that a number of companies do that. You will see some examples of that in the back of our testimony, one of the appendixes in our testimony today, in another place, in another State.

Senator NELSON. Thank you.

The CHAIRMAN. Thank you all very, very much.

I will call our next witness, Mr. Elmer Chatak, secretary-treasurer, Industrial Union Department, AFL–CIO. I know some people have to make a plane to California—we are mindful of that and we will adjust our schedule to allow ample time.

You have an appointment, too, I believe, Mr. Chatak.

Mr. CHATAK. I do, sir.

The CHAIRMAN. We welcome you back to our forum.

STATEMENT OF ELMER CHATAK, SECRETARY-TREASURER, INDUSTRIAL UNION DEPARTMENT, AFL–CIO, ACCOMPANIED BY SHELDON W. SAMUELS, DIRECTOR, HEALTH, SAFETY AND ENVIRONMENT, INDUSTRIAL UNION DEPARTMENT, AFL–CIO

Mr. CHATAK. I hope we do a little better than the last time I appeared before you about 1 year ago with Lloyd McBride on labor law reform—I hope we do a little better this trip.

And I will summarize my statement.

My name is Elmer Chatak, and I am secretary-treasurer of the Industrial Union Department. The Industrial Union Department includes as its affiliates 58 unions representing some 6 million working men and women. With me to my left is Sheldon Samuels, our director of health, safety and environment. We are, of course, pleased to be with you today to share our views about legislation before your committee relating to occupational safety and health.

When our president, Howard Samuel, testified on April 1 during the oversight phase of your hearings, he pointed out how intense the feeling among rank and file union members is regarding the program authorized by the Occupational Safety and Health Act. The IUD is sponsoring regional safety/health conferences this year, and the attendance uniformly has been larger and more enthusiastic than expected. The message from the rank and file is simple and emphatic: don't do anything to weaken the Occupational Safety and Health Act.

In my 30 years in the labor movement, I have seldom, if ever, seen an issue unify working men and women the way they are rallying against challenges to the Occupational Safety and Health Act.

Just as a side note, we had made arrangements for about 300 at the rally in Pittsburgh and about 200 at the rally in Milwaukee, and we were overwhelmed with about 700 of our leaders from these two areas.

There is nothing wrong with the Occupational Safety and Health Act, and we hope you will not approve legislation amending it. Administrative improvements can, of course, be undertaken and they have been, but the basic thrust of the act is sound and should not be changed.

I still consider myself a rank and file, Mr. Chairman. I worked in the mills and I know how important the Occupational Safety and Health Act is to working people. In fact, I still have a few scars. And the workers know how important it is to their welfare, and they will fight to protect it.

You are familiar with the reasons for our opposition to legislation which would weaken OSHA and the safety program it authorizes. We request that the resolution of our executive council and an analysis developed by our legal counsel detailing our position be filed for your hearing record.

The CHAIRMAN. And we appreciate that, and it will be included in our record.

Mr. CHATAK. We would like to share with you our reactions to some of the testimony you have heard during the oversight phase of your hearings, and to comment on certain other developments which have occurred in connection with your consideration of S. 2153.

During your oversight hearings, we were shown charts of statistics drawn on narrow sheets to exaggerate the rise and fall of year-to-year fluctuations in injuries and deaths and to minimize long-term trends. The least meaningful measure of employer-reported injuries—lost-time injuries—was selected to become the base of a legislative proposal.

I have personally received a letter from Senator Schweiker at home this weekend--I haven't moved yet, I still maintain my residence in Pittsburgh, and with this housing market I may never become a Washingtonian. The letter was addressed "Dear Labor Leader," suggesting our opposition to S. 2153 is based—and I quote—on "the need to come up with an issue to rally the rank and file around in an election year." This is simply untrue. We are opposed to S. 2153 because we believe it would seriously weaken the occupational safety and health program.

We listen to misleading testimony from business witnesses which looks and sounds as if it could have been written a generation ago, blaming the worker for most accidents, citing reports of employers compiled in a manner that assumes the myth of the accident-prone worker and confuses this assumption with a scientifically valid conclusion.

We are subjected to a definition of "establishment" that would guarantee for giant corporations special treatment that even small business should not have.

We are told by management that OSHA erred in adopting management's own standards. We are then told to embrace the ponderous, biased management organizations that have produced the thousands of antiquated, inadequate standards in the first place. Those organizations and their procedures are no substitute for the mechanism you mandated 10 years ago—simple and fair procedures backed by the National Institute for Occupational Safety and Health.

And all of this, we are warned, is being done for our own good, to save us from a fate even worse.

When we file a complaint, which is rare, we have a right to expect an OSHA inspector to show up at the plant without first notifying the employer in advance of an inspection and seeking assurances that a hazard might not exist.

We have a right to judge an employer's safety record on the basis of actual evidence of serious injuries, such as those that result in unconsciousness, and not on the basis of arbitrary definitions that would permit an employer's manipulation of lost-time reports.

We have a right to expect that when OSHA enters a plant in response to a complaint which may not specify every hazard, especially those unfamiliar to either the workers or the employer, the OSHA inspector will be unfettered in his investigation. S. 2153 would qualify that right.

Anyone who has worked in a plant will understand that the obvious hazards often are symptoms of something systemically wrong. It takes expertise to understand that system and to design corrections. While that expertise is being developed in the labor movement, among employers and within the Government, it will remain scarce and must be efficiently utilized. Comprehensive plant surveys, beyond the scope of the hazard triggering an inspection, will always be essential.

We have a right to the kind of vigorous action typified by OSHA's thorough wall-to-wall inspection of Tenneco's Newport News Shipbuilding & Dry Dock Co. in Virginia. More than 600 violations were found after 60 days of work by 100 inspectors; 54 willful violations were found. And, incidentally, I think the agency had to force their way into the yard through a court order.

As the chief organizer of the new local union that filed the complaint triggering the inspection, I can testify from personal experience that the act and its implementation is very effective. And as an aside, I can say that had there not been an effort down there, a unionization effort, which I think you know a little bit about, there wouldn't have been any charges filed, and had there not been the act I dread the thought of what would be transpiring in that one individual place of employment.

One of the issues raised in the oversight hearings, the rationalization for the proposal before you, is targeting or hazard control.

Dr. Bingham has made important strides toward better hazard control. She has gone about as far as she can with the current information base.

OSHA and NIOSH have begun to put together the first serious population study of injury. But that is only the first step. The hazards that cause these injuries and the operations associated with these hazards must also be studied, taking into consideration operational design, the process of which they are a part, and their geographical distribution.

Hazards must be selected for control based on their impact and controllability. They must be controlled, and therefore studied, on an operation-by-operation basis. The size and industrial classification of the establishment where the operation takes place are relatively unimportant. Welding is hazardous in an auto repair shop or in an auto assembly plant. The operation needs to be designed properly in order to be controlled properly wherever it takes place.

Only when we start this kind of serious scientific and engineering research can we take the next step: the setting of standards. But this is a step that can be started as soon as the first data are generated.

The standard is the critical element in the reduction of risk. The standard defines the risk to be controlled, the level of control, and the method of control. The selection by the Secretary of a risk for control by a standard largely determines the priorities of enforcement and education. It is not the only factor, but it is the key to setting agency priorities.

Most standards are outmoded and urgently need to be revised. Having done that, the existing program of training for OSHA inspectors can focus on the location and analysis of operations and associated hazards to be controlled.

This, in our judgment, is a sensible system of targeting.

I did rush, and in closing, Mr. Chairman, let me thank you for the opportunity to express our views on the legislation before you, S. 2153 in particular.

As our statement indicates, we regard S. 2153 as a very serious challenge to the welfare of the working people, and we are prepared to exert every effort, together with our allies inside and outside the labor movement, to defeat it.

And I am now prepared to respond to any questions.

And I would just want to make one other side comment, that the slogan of the IUD, in response to some of the slogans that were attributed to the labor movement--our slogan is: "OSHA Saves Lives."

[The prepared statement of Mr. Chatak follows:]

TESTIMONY

OF

Elmer Chatak, Secretary-Treasurer
Industrial Union Department, AFL-CIO

Before the Senate Committee on
Labor and Human Resources

April 15, 1980

Accompanied by
Sheldon W. Samuels, Director
Health, Safety and Environment
Industrial Union Department AFL-CIO

Mr. Chairman and Members of the Committee, my name is Elmer Chatak. I am Secretary-Treasurer of the Industrial Union Department of the AFL-CIO. The Industrial Union Department includes as its affiliates 58 unions representing some six million working men and women. Accompanying me is Sheldon W. Samuels, the IUD's Director of Health, Safety and Environment. We are pleased to be with you today to share our views about legislation before your Committee relating to occupational safety and health.

Let me say at the outset that we are disappointed that the "oversight" phase of your hearings was limited to just a few days. We had hoped that extensive oversight hearings could have been held to examine in detail the implementation of the Occupational Safety and Health Act this year, the 10th anniversary of its enactment.

When IUD President Howard Samuel testified on April 1 during the oversight phase of your hearings, he pointed out how intense the feeling among rank-and-file union members is regarding the program authorized by the Occupational Safety and Health Act. The IUD is sponsoring regional safety conferences this year, and the attendance uniformily has been larger and more enthusiastic than expected. The message from the rank and file is simple and emphatic: "Don't do anything to weaken the Occupational Safety and Health Act."In my 30 years in the labor movement, I have seldom, if ever, seen an issue unify working men and women the way they are now in the face of challenges to the Occupational Safety and Health Act.

In urging that your Committee reject legislation which might weaken the program to protect the safety and health of working men and women, Mr. Samuel quoted these words of wisdom:

"If it ain't broke, don't fix it."

Page 2

There's nothing wrong with the Occupational Safety and Health Act, and we hope you will not approve legislation to amend it. Administrative improvements can, of course, be undertaken and they have been, but the basic structure of the Act is sound and should not be changed.

Mr. Chairman, I am not an expert in occupational safety and health, a statistician or safety engineer. Mr. Samuels is a safety and health expert. Yet I am not uncomfortable participating in the debate surrounding S. 2153, the so-called Occupational Safety and Health Improvements Act, or other proposals which would weaken OSHA, because the technical and scientific issues have been obscured by the nature of the controversy. To refer to the provisions of S. 2153 as "improvements" is, in our judgment, a gross misuse of the word. Webster defines to "improve" in this way:

> "to make greater in amount or degree; to enhance in value or quality; to make better..."

The provisions of S. 2153, by this definition, are anything but improvements in our view.

I am from the rank-and-file, Mr. Chairman. I worked in the mills, and I know how important the Occupational Safety and Health Act is to working people. And they know how important it is to their welfare, and they will fight to protect it.

You are fmiliar with the reasons for our opposition to legislation which would weaken OSHA and the safety program it authorizes. We request that the resolution of our Executive Council and an analysis developed by our legal counsel detailing our position be filed for your hearing record.

We would like to share with you our reactions to some of the testimony you have heard during the oversight phase of your hearings and to comment on certain other developments which have occurred in connection with your consideration of S. 2153.

During your oversight hearings, we were shown charts of statistics drawn on narrow sheets to exaggerate the rise and fall of year-to-year fluctuations in injuries and deaths and to minimize long-term trends. The least meaningful measure of employer-reported injuries--"lost-time" injuries--was selected to become the base of a legislative proposal.

I have received a letter from Senator Schweiker at home, addressed "Dear Labor Leader", suggesting our opposition to S. 2153 is based--to quote from the letter--on "the need to come up with an issue to rally the rank and file around in an election year." That is simply untrue. We are opposed to S. 2153 because we believe it would seriously weaken the occupational safety and health program.

We would point out, Mr. Chairman, that it took bipartisan support to enact the Occupational Safety and Health Act; we are grateful to you and your colleagues--Republicans and Democrats--who worked to enact OSHA. We had Republican and Democratic allies in the enactment of OSHA, and now we are confronting Republicans and Democrats in the fight to preserve the Act and its protections.

We are told that little progress has been made when even management witnesses point to substantial progress.

We listen to misleading testimony from business witnesses, which looks and sounds as if it could have been written a generation ago, blaming the worker for most "accidents," (citing reports of employers compiled in a manner that assumes the myth of the "accident prone" worker and confuses this assumption with a scientifically valid conclusion).

We are subjected to a definition of "establishment" that would gurantee for giant corporations special treatment that even small business should not have.

We are told by management that OSHA erred in adopting management's own standards. We are then told to embrace the ponderous, biased management organizations that have produced the thousands of antiquated, inadequate standards in the first place. Those organizations and their procedures are no substitute for the mechanism you mandated 10 years ago—simple and fair procedures backed by the National Institute for Occupational Safety and Health.

And all of this, we are warned, is being done for our own good, to save us from a fate even worse.

What is really at stake are rights which, like all human rights, are drawn from the struggle to live. For industrial workers, the rights you confirmed for us in 1970 are essential for health and safety on the job.

When we file a compliant—which is rare—we have a right to expect an OSHA inspector to show up at the plant without first notifying the employer in advance of an inspection and seeking "assurances" that a hazard might not exist. The proposed bill could enable this special (and dangerous) treatment on the basis of an effectively unverifiable affidavit filed by that employer stating that his factory is "safe"; that is, no one died or was injured (lost a workday) and no more than two such injuries per 100 full-time workers each year.

We have a right to judge an employer's safety record on the basis of actual evidence of serious injuries—such as those that result in unconsciousness—and not on the basis of arbitrary definitions that would permit an employer's manipulation of lost-time reports.

We have a right to expect that when OSHA enters a plant in response to a complaint which may not specify every hazard, especially those unfamiliar to either the workers or the employer, the OSHA inspector will be unfettered in his investigation. S. 2153 would qualify that right.

Anyone who has worked in a plant will understand that the obvious hazards often are symptoms of something systemically wrong. It takes expertise to understand that system and to design corrections. While that expertise is being developed in the labor movement, among employers and within the government, it will remain scarce and must be efficiently utilized. Comprehensive plant surveys, beyond the scope of the hazard triggering an inspection, will always be essential.

We have a right to the kind of vigorous action typified by OSHA's thorough, wall-to-wall inspection of Tenneco's Newport News Shipbuilding and Dry Dock Company in Virginia. More than 600 violations were found after 60 days of work by 100 inspectors.; 54 willful violations were found.

As the chief organizer of the new local union that filed the complaint triggering the inspection, I can testify from personal experience that the Act and its implementation is effective.

We have these rights because they are necessary. You confirmed them in law. We ask that you not take them away - for any reason. We ask, instead, that you join us in providing constructive guidance to our national program of workplace safety.

The Industrial Union Department has never argued with the need to improve the administration of the Act. For this purpose, the Act does not need to be amended. While Dr. Bingham at OSHA and Dr. Robbins at NIOSH have started to clear awaythe obstacles to greater progress, more does need to be done.

One of the issues raised in the oversight hearings, the rationalization for the proposal before you, is "targeting" or hazard control.

Dr. Bingham has made important strides toward better hazard control. She has gone about as far as she can with the current information base. Indeed, that base is so inadequate that it is ridiculous to suggest that it be used in a legislative mandate of any kind. We cannot even be sure that it can measure the most important injuries!

OSHA and NIOSH have begun to put together the first serious population study of injury. But that is only the first step. The hazards that cause these injuries and the operations associated with these hazards must also be studied, taking into consideration operational design, the process of which they are a part and their geographical distribution.

Hazards must be selected for control based on their impact and controllability. They must be controlled - and therefore studied - on an operation-by-operation basis. The size and industrial classification of the establishment where the operation takes place are relatively unimportant. Welding is hazardous in an auto repair shop or in an auto assembly plant. The operation needs to be designed properly in order to be controlled properly wherever it takes place.

These kinds of studies are rare in any country.

You should be outraged, as we are, that systematic research of this kind has never been done in this country - 200 years after the Industrial Revolution and a decade after the passage of the Occupational Safety and Health Act.You should join us in demanding that NIOSH be upgraded to become a National Institute in fact, as you intended, so that it can become a full partner in this effort. This does not require a new law. It requires that you exercise your oversight responsibilities.

Only when we start this kind of serious scientific and engineering research can we take the next step: the setting of standards. But this is a step that can be started as soon as the first data are generated.

The standard is the critical element in the reduction of risk. The standard defines the risk to be controlled, the level of control and the method of control. The selection by the Secretary of a risk for control by a standard largely determines the priorities of enforcement and education. It is not the only factor, but it is the key to setting agency priorities.' The Occupational Safety and Health Act took this into account when it developed the concept of a workplace standard into what it is today: a unique, complete system of risk management. The OSHA standards concept enable us to control risk operation-by-operation, as it actually exists, regardless of the industry or size of establishment. Effective education and effective enforcement depend not on the control of every hazard in every workplace, but on control of the worst hazards capable of correction in the workplace wherever they occur. This is done by specific standards. By law and practice, all OSHA standards set goals, explicitly or implicitly, to be met by either a stated method of compliance or by a design developed by the employer. In part because the standards (which mostly were set by management prior to the passage of the Act) are literally standardized practices, there are few applications for variances. (There were only 73 applications for regular variances in the last fiscal year and only one for a research variance in the history of the Act.)

These standards are outmoded and urgently need to be revised. Having done that, the existing program of training for OSHA inspectors can focus on the location and analysis of the operations and associated hazards to be controlled.

This is a sensible system of targeting. It would permit OSHA to make even greater progress. But it will only happen if your Committee demands that OSHA be given more administrative flexibility to focus its resources on the task at hand. How? Let me cite just two examples:

- Make-work (and falsely-scientific) exercises designed to slow down the standards process (such as cost/benefit analyses) must end.
- Provisions in the Act for labor-management cooperation through standards advisory committees must be implemented. To accomplish this, OMB resistance must be overcome. Given the current state of industrial relations, cooperation can occur only under government auspices.

As I pointed out at the outset of this statement, IUD President Samuel summed up our attitude about the Occupational Safety and Health Act by quoting the adage that ..."If it ain't broke , don't fix it." To that I would only add, "Don't break it!" Don't approve any legislation which would weaken the OSHAct and the protection it provides working Americans from hazards in the workplace.

Mr. Chairman, thank you for this opportunity to express our views on legislation before your Committee -- particularly S.2153. As our statement indicates, we regard S. 2153 as a very serious challenge to the welfare of working people, and we are prepared to exert every effort, together with our allies inside and outside the labor movement, to defeat it. We are prepared to respond to any questions you may wish to ask us.

Industrial Union Department AFL-CIO

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Howard D. Samuel, President
Elmer Chatak, Secretary-Treasurer

SCHWEIKER BILL

When the Occupational Safety and Health Act of 1970 was enacted into law less than a decade ago, it was hailed by the labor movement as the dawn of a new day. At long last, the Congress had acknowledged the right of American workers to be protected from unnecessary hazards in the workplace. It was a great victory for working men and women. The increasing effectiveness of the Act has been demonstrated most recently by a 10 percent decrease in the rate of fatalities reported by employers last year.

Since its enactment the Occupational Safety and Health Act of 1970 has been under almost constant attack in Congress; most of these assaults have come in the form of amendments to measures appropriating funds for the Occupational Safety and Health Administration. They have been designed in one way or another to restrict the coverage of the Act.

Now OSHA faces a new challenge.

Under the title of the "Occupational Safety and Health Improvements Act of 1980", Senator Richard Schweiker and five of his colleagues have launched a serious attack on the Occupational Safety and Health Act. The Schweiker bill, introduced with the cosponsorship of Senators Harrison Williams, Alan Cranston, Gaylord Nelson, Frank Church, and Orrin Hatch, could exclude an estimated 90 percent of the workplaces in America from safety inspections. Enactment of the bill would represent a dramatic retreat from the commitment spelled out in the landmark Occupational Safety and Health Act.(Senator Nelson has withdrawn as a co-sponsor.)

Specifically, under the Schweiker bill:

- o Employers could qualify for an exemption from most safety inspections simply by filing affidavits claiming low rates of injury. By establishing advisory safety committees and voluntary consultation programs, these employers would be exempted from most fines resulting from permitted inspections. An employer who reported a low injury rate could remain exempt from most inspections for up to a year.

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- Employers who qualified for such special treatment would receive advance notice of inspections scheduled in response to worker complaints.
- Inspectors would not be permitted to respond to worker safety complaints if "satisfactory assurances" were provided to OSHA by management.
- OSHA resources would be diverted from enforcement and education to the processing of thousands of affidavits and the development of information systems to be operated by state workers' compensation agencies for the purpose of determining whether employers qualify for exemptions.

It is particularly distressing to us that the four Democratic sponsors of the Schweiker bill--including Chairman Williams of the Labor and Human Resources Committee--are Senators who have been friends of the labor movement. We call upon the four of them--Senators Williams, Nelson Cranston, and Church--to disavow their cosponsorship of this legislation and instead work with us for real improvements in the program authorized by the Occupational Safety and Health Act of 1970.

The Executive Council of the Industrial Union Department of the AFL-CIO urges in the strongest possible terms that this legislation be defeated. We call upon the Senate Labor and Human Resources Committee, to which the bill (S. 2135) has been referred, to reject it. We intend to use all of the resources at our command in a unified effort to defeat the Schweiker legislation.

Adopted: January 11, 1980

Key Features of the Schweiker-Williams Act of 1980

1. OSHA is prohibited from conducting any periodic general schedule safety inspections of any "qualified" employer's workplace.

2. Employers can obtain such an exemption very, very easily:

a. An employer automatically qualifies for an inspection exemption if he does not appear on a list of companies who during the preceding year reported to a state workers' compensation agency an occupational injury resulting in two or more lost workdays. (The accuracy of that list is not open to challenge. Therefore, employers can create their own exemptions by filing false reports -- whether intentionally or negligently. Employers also can get the benefit of an exemption because of administrative errors of state agencies.)

b. Even employers who cannot qualify by virtue of that list are exempt if they merely file an affidavit asserting that during the preceding year they had no employee deaths caused by occupational injury, and the lost workday injuries at their workplace were not greater than 2 per 100 employees.

THE SPONSORS PREDICT THAT OVER 90 PERCENT OF ALL WORKPLACES WOULD BE EXEMPT UNDER THESE LAX STANDARDS.

3. The sponsors also would destroy the system of civil penalties for safety violations -- the deterrent which lies at the heart of the Act's enforcement mechanism:

a. If a location has 10 or fewer employees, a qualified employer is immune from any penalty, except for willful or repeated violations.

b. As to larger employers, no penalty can be assessed against any "qualified" employer for any violation (other than a willful or repeated) so long as the employer maintains an "advisory safety committee" and a "regular consultation program" -- irrespective of whether or not the employer carries out any of the recommendations of his safety committee or consultants.

c. Even unqualified employers are subject only to a maximum $700 fine for a serious violation and $300 for a non-serious violation if they maintain a safety committee and consultation program.

4. Where an employee complaint of a safety violation at a qualified employer's workplace is filed, the employer must be given advance notice by OSHA before inspecting and the employer can prevent the inspection altogether by providing "satisfactory assurances that appropriate action, if any, has been taken to correct the violation."

5. No report of a safety committee or consultant and no assurances given by the employer to OSHA can be used as evidence of a willful violation if the employer had a "reasonable, good faith belief" that he was not in violation.

6. Even the occurrance of a serious accident does not entitle OSHA to inspect the workplace of a "qualified" employer unless there has been a death, or more than one employee has been hospitalized.

7. In the few cases where a safety inspection is permitted, the inspection cannot be wall-to-wall, but must be limited in scope to the particular situation which "justifies" the inspection. Thus, for example, while the bill would not affect health hazard inspections, an inspector conducting such an inspection could not go on to inspect safety hazards (except for safety violations found during the normal course of conducting the health hazard inspection).

8. Despite the shortage of funds for OSHA enforcement, the bill would authorize an appropriation of $5 million yearly for grants to state agencies to be used solely for revising the administration of state workers' compensation programs so as to generate the data by which to determine whether employers qualify for exemptions from inspections.

The **Chairman**. Very good, a good statement, a very helpful statement. I am interested in your suggestion that effective targeting of OSHA's resources should be based on the operation and the hazard and should be focused by the standard. The welding example is certainly a good example. Certainly welding, wherever it is, is a hazardous operation, and that is so irrespective of the workplace in which it is undertaken.

OSHA's current enforcement targeting is not based on the hazard. Rather, OSHA targets its inspections on the basis of the rate of injury in broad industrial classifications. I am just wondering—you shake your head in agreement, that is what your statement really basically is. That is a criticism of OSHA's current "worst first" targeting model.

Mr. **Chatak**. I defer to Mr. Samuels.

Mr. **Samuels**. You are correct, it is a criticism of the system adopted at the time the act went into effect. As you remember, Senator, there was a great rush to get a record system into place. And what they adopted was a combination of the National Safety Council system, the American National Standards Institute, which is a management organization system, and the economic system of SIC [inaudible]. It was a pasteup kind of job.

Dr. Bingham this morning indicated to you, and we agree with that, that she is trying to change that base to come up with a better means by which we can target.

We have said in our testimony that that can only occur if the research capability you mandated when the act went into effect becomes a really serious research capability so we can develop a new data base. Now, this doesn't mean waiting for 10 years until we have all the answers—we will never have all the answers. We should begin using such a modern data base within a year.

And we support Dr. Bingham's initiatives and Dr. Robbins' initiative in this area. But we would like to point out that there is something that they perhaps are reluctant to tell you, and that is that there really is no National Institute for Occupational Safety and Health; it is still a bureau at the bureau level of government, which it was prior to your creating it. They do not have the capability to fully provide the kind of research base that Dr. Bingham needs for targeting. As there are other impediments, too.

We talked about standards. And it is important, as Senator Schweiker pointed out, to have wherever possible management cooperation. Another impediment, which is not mentioned in the administration testimony, is the fact that labor-management committees which you mandated in the act are no longer being formed for the standard-setting process. We don't have them anymore. They have been, by OMB mandate, eliminated.

Senator **Schweiker**. Automatically or arbitrarily?

Mr. **Samuels**. Arbitrarily. The Secretary has the option of calling into effect such a committee. These committees have not been called into effect since the last 2 or 3 years.

Senator **Schweiker**. Because of an Executive order?

Mr. **Samuels**. It was an informal order to reduce the number of advisory committees. They didn't make a distinction between those mandated by law and those which are arbitrarily put together by the agency.

Senator SCHWEIKER. Well, what's happening then in the areas of these standard-setting procedures where they are called into play? Does that hold up the process, or are they going ahead without them? Or how is it working now?

Mr. SAMUELS. These committees themselves are not a block to setting standards in terms of pace. They are a block in the sense of not providing the broadest possible input from management and labor. Right now, of course, we have the hearing, and we are not complaining about that, but very often we feel, as in the case of coke ovens and other kinds of committees——

Senator SCHWEIKER. What would be some standards specifically that we are not doing this on? Could you give me a few specifics or put it in the record later on?

Mr. SAMUELS. Well, we would like to see a large number of standards set, and that means that there ought to be in operation simultaneously standards committees. It's difficult to pick one out. I mean, any of the needs that we have.

Senator SCHWEIKER. Well, let me ask the question another way. Can you give me an illustration or two where you feel because you have had these committees, they have done a good job, and you had an input in the output, so to speak?

Mr. SAMUELS. Yes. Coke ovens, the group of 14 carcinogens. Dr. Bingham was a member of the committee of 14 carcinogens, and she was chairperson of the committee on coke ovens.

Senator SCHWEIKER. So none of these are going ahead at all?

Mr. SAMUELS. These committees are not being called into being. I think they are an impediment to good targeting.

Senator SCHWEIKER. These committees, as I recall, were labor and management.

Mr. SAMUELS. Yes, the law says that labor and management must be equally represented; the law says that State government, the professions, and NIOSH must also be represented.

Senator SCHWEIKER. What kind of labor-management cooperation in those committees that did function did you have? Was it varied, or how did it work?

Mr. SAMUELS. Oh, it was fiery at times. But the products were good.

Senator SCHWEIKER. In other words, the process was there and worked, even though it got a little hot at times.

Mr. SAMUELS. Very hot. And they were in fact sometimes enjoyable to listen to.

Senator SCHWEIKER. Well, I would share your concern. I didn't know they had completely stopped; that's news to me. I realized they had cut out this advisory committee thing, I am sorry to see that has completely stopped. I would agree with you that probably sometimes when they are fiery you have some good input.

So we, aside from the bill, will certainly look into it, to see if there is a way to resurrect that somehow. I didn't know that he could arbitrarily stop that, even though we mandated it. That's the part I am concerned about.

Since we have a vote on, I guess that's all the questions I have. Wait just a minute and see if Senator Williams has another question. We'll probably take just a very brief recess while we go vote.

[Pause.]

Senator **Schweiker**. Do you recall—are those committees mandated under law or is that the option of the President?

Mr. **Samuels**. They can be called into being at the option of the Secretary, but the mechanisms, once he does that, are mandated.

Senator **Schweiker**. It is permissive, unfortunately. I think that is a very valid point, though: I don't know how we are going to deal with some of these very complex ones without that kind of an input. It seems to me that is where the knowledge and the skill is on both sides.

We do have a vote on and Senator Williams doesn't have any more questions for this panel, so we thank this panel very much. When we come back we will hear Panel No. 5.

Mr. **Chatak**. Thank you for the opportunity.

Senator **Schweiker**. We will take a brief recess.

[The committee recessed briefly.]

[Senator Schweiker assumed the Chair.]

Senator **Schweiker**. All right, we will go ahead with our next panel. We appreciate their patience and perseverance.

Mr. Donald Matthews, chairman of the Energy Committee, American Subcontractors Association; Robert G. Griffith, vice president, National Utility Contractors Association; and Ron Davis, national vice president, public affairs, American Society for Personnel Administration.

I understand Mr. Davis has a plane connection problem, so we will let you go first.

STATEMENTS OF RON DAVIS, NATIONAL VICE PRESIDENT, PUBLIC AFFAIRS, AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION, GREENSBORO, N.C., ACCOMPANIED BY PRISCILLA CAMPERUD, DIRECTOR OF PERSONNEL, ST. JOSEPH'S HOSPITAL, STOCKTON, CALIF.; DONALD MATTHEWS, CHAIRMAN, ENERGY COMMITTEE, AMERICAN SUBCONTRACTORS ASSOCIATION, WASHINGTON, D.C.; AND ROBERT G. GRIFFITH, VICE PRESIDENT, NATIONAL UTILITY CONTRACTORS ASSOCIATION, CHANTILLY, VA., ACCOMPANIED BY DON DeHART, SAFETY CONSULTANT, NATIONAL UTILITY CONTRACTORS ASSOCIATION, INDIANAPOLIS, IND.

Mr. **Davis**. Thank you, Senator. I appreciate the opportunity to be here. My name is Ron Davis, I am national vice president of public affairs of the American Society for Personnel Administration and vice president, industrial relations, Carolina Steel Corp., in Greensboro, N.C. I am accompanied today by Priscilla Camperud, who is director of personnel, St. Joseph's Hospital, in Stockton, Calif. She is a member of ASPA's Health, Safety and Security Committee.

The American Society for Personnel Administration is the world's largest professional organization of personnel and industrial relations practitioners in business, industry, government, and education. It has 30,000 members and 330 chapters in all 50 States, and in 29 foreign countries. ASPA's members represent organizations which employ about 27 million people. While these firms range in size from very large to very small, the majority are companies that can be categorized as small business. ASPA is intensely interested in the Occupational Safety and Health Act because it affects the daily activities of every member of our organization.

Support of OSHA reform does not imply indifference to the health and safety of American working men and women, as some have claimed. We do not maintain that every workplace in this country is hazard-free. We do, however, feel that a change in the emphasis and direction of the Occupational Safety and Health Administration is long overdue.

When a governmental agency is so onerous as to assure the almost universal opposition of employers, something is seriously wrong. Despite the fact that business has spent $25 billion and the Government $1.5 billion on occupational safety and health since 1971, we have not had the gratification of seeing any reduction in the number of fatalities or serious injuries to American workers.

We are here today to support the efforts of Chairman Williams, Senator Schweiker and the distinguished and bipartisan group of cosponsors to bring a rational and constructive approach to the critical issue of regulatory enforcement. The bill before this committee, S. 2153, represents a thoughtful, although limited, attempt to rein in the excesses and redirect the efforts of the Occupational Safety and Health Administration and focus it away from the vast majority of workplaces which are not unsafe.

We note at the outset the limited nature of this bill. It does not exempt workplaces from the coverage of the act. It does not prohibit the Secretary of Labor from carrying out his duties under the act to insure that critical workplace safety conditions are dealt with in a prompt and expeditious manner. Rather, this bill represents an attempt to establish for OSHA the priority that the sponsors of the original act obviously intended, that is; to encourage employers and employees in the first instance to bear the responsibility for making their workplaces safe and healthy. This policy, found in section 2(b) of the OSHA Act, clearly indicates that Congress did not intend that OSHA become the all-present Federal policeman in every workplace. OSHA's mandate was to provide the guidance necessary for employers to achieve the safety standards appropriate for their individual workplaces.

This mandate has been clearly ignored in OSHA's rush to regulate. Rational regulatory enforcement cannot be achieved by Washington officials mouthing pieties about deregulation while at the same time reaching for new ways and concepts to increase their control over the Nation's workplace. This, unfortunately, has been our experience under OSHA and this is why this legislation is so clearly needed.

While we believe that S. 2153 goes a long way toward achieving the necessary redirection of an agency still out of control, we believe that certain changes in the legislation should be considered by this committee.

The problems faced by employers under OSHA evolve in large measure from the apparent inability of the compliance officers to deal with each workplace as a separate and distinct facility. What we experience is enforcement "by the book" by compliance officers who are often unfamiliar with the vast welter of safety regulations promulgated by OSHA and who appear to be under pressure from the agency to "bring back citations." We believe that the Congress can help alleviate this problem by directing that a greater proportion of OSHA's budget be directed toward compliance officer training and, further, that a separate cadre of compliance personnel be established to deal with the special instances addressed by section 4 of the bill.

Section 4(d) contemplates and requires that employers establish an advisory safety committee consisting of employees and employer representatives. While we endorse the proposition that workplace safety is, in the first instance, the responsibility of employers and employees, we are concerned that the bill, as drafted, leaves too many questions.

First, section (f)(2)(E) allows employees to unilaterally eliminate the employer's penalty exemption by refusing to participate on an advisory committee. We are concerned that this provision will undermine the purposes of S. 2153 and result in a paper policy without actual implementation.

Second, the concept of a legislatively mandated advisory committee would seem to confuse the collective-bargaining relationships where they exist, and to force employees who choose not to be organized to nevertheless engage in "collective action" in order to avail themselves of the benefits of this act. In particular, we are concerned that an advisory committee meeting may be transposed into a formal negotiating session under the National Labor Relations Act. What would be the status of such a meeting? Which agency would determine whether an appropriate representative of employees was chosen? Would a union's refusal to participate in an advisory committee constitute breach of its duty of fair representation? These are but some of the questions raised by this proposal. Others include the problem of defining what is an employer's response to the recommendations of the committee as required by (f)(2)(A). Must an employer agree with every recommendation? Would the advisory committee be bound to the standards of feasibility as provided in section 6(b)(5)? What would be the effect of a settled citation and abatement order on the recommendations of the committee?

We believe these problems are too fraught with uncertainty and the potential for confusion too apparent to make the advisory committee concept a requirement of the act.

These are but a few of the technical concerns we have with the bill. We want to emphasize, however, our strong support and endorsement of the effort of this committee to bring real fulfillment of the goal of regulatory reform. This bill will serve as the foundation for a new reality of workplace regulation. ASPA looks forward to working with the committee and the Congress in order to achieve this goal.

On behalf of the American Society for Personnel Administration, I want to thank you for allowing me the opportunity to present our views.

[The chairman resumed the Chair.]

The CHAIRMAN. I just wonder about the problem you see with respect to joint advisory safety committees, and whether, in your view, the employer would stand the risk of violating section 8(a)(2) of the National Labor Relations Act?

Mr. **Davis**. No; we don't really see any problem with 8(a)(2). 8(a)(2) contemplates the area of company domination of an embryo union, if you will, or organizational group, company-dominated union type of thing.

So I don't see 8(a)(2), but there could possibly be a question of whether the union is fairly representing their people if they refuse to participate.

We haven't contemplated any problem with 8(a)(2) as such. 8(a)(2), as I said, is that area that deals with the company domination of a union, which is illegal under 8(a)(2).

The area of representation—safety is one of the areas required of the union to represent in collective-bargaining situations, and we are concerned that we may set up a new arena or that there may be some new argument that might come about in that respect.

The **Chairman**. That's all I had, Dick—thank you.

[Senator Schweiker assumed the Chair.]

Senator **Schweiker**. I just have one question, Mr. Davis. You said on page 3 of your statement that OSHA has failed to implement the policy of section 2(b) of the act to encourage employers and employees in the first instance to bear the responsibility for safety.

How do you think we can better encourage employer-employee cooperation, if we don't have labor-management committees that you have some concern about, and we are not implementing it now—how can we achieve it?

Mr. **Davis**. Well, the act states to encourage employers and employees in the first instance to bear the responsibility of making the workplace safe and healthy. We believe that your bill, Senator, could help to do that, because it is placing them in at least a different arena, without the outside intervention of an agency—it is our responsibility first, let us deal with it as a first play.

Most companies that I am aware of, certainly in the groups that we deal with in ASPA, have some type of employee safety committee. There is already in place some vehicle for cooperation on safety matters and we don't want to just say blandly and totally that there would not be safety committees, because they have a very vast impact on what goes on in my own company, in all 15 locations. We not only encourage it, we demand this type of organization.

We are concerned, though, that if there is this kind of requirement that there be clear definition as to what its role is as far as the National Labor Relations Act, or any of that type of thing.

Senator **Schweiker**. All right, thank you very much, and we will excuse you.

Ms. **Camperud**. Senator?

Senator **Schweiker**. Yes.

Ms. **Camperud**. I would also like to respond to that question.

Senator **Schweiker**. Sure.

Ms. **Camperud**. At St. Joseph's Hospital in Stockton, Calif., we have almost 1,400 employees and we are 50 percent unionized, and we do have an advisory committee in which the employees do participate within the hospital, without the labor-management agreement. And it is working very successfully.

And the reason that it is working I think is because we are management by objective, and we encourage employees to participate in order to make sure that the work environment is safe. And we are also very concerned about cost containment, so we feel that a safe environment also helps reduce your cost, because it keeps your employee injuries down.

Senator SCHWEIKER. Anything else you want to add to the statement?

Mr. DAVIS. No, we appreciate your efforts and wish you success, and we will do anything we can in terms of data, because we do have a rather excellent data base, if it's necessary.

Senator SCHWEIKER. I wonder, Miss Camperud, if you would submit for the record a description of that safety committee. We think we would like to have that.

Ms. CAMPERUD. All right.

Senator SCHWEIKER. All right, thank you both very much. We will go ahead, then, with Mr. Matthews.

Mr. MATTHEWS. Thank you, Senator. My name is Donald Matthews, and I am president of Explosives Engineers, Inc., in Sparks, Md. I am also current president of the Society of Explosives Engineers, an international organization of people involved in the explosives industry. Also I am a member of the American National Standards Institute, an organization that promulgates safety standards, many of which have been adopted by OSHA.

However, today I address you as a representative of the American Subcontractors Association, where I am chairman of the ASA Committee on Construction Safety.

I have with me Mark Ward, ASA director of public relations.

Subcontractors are involved in specialty trades such as plumbing, masonry, plastering and excavation, as well as drilling and blasting. We are usually hired by a general contractor to perform the many specialized tasks that make up some 85 percent of the construction work on an average jobsite. ASA is unique in that it represents subcontractors of all trades, an estimated one-half million firms nationwide.

Now, rather than just read the text that you have before you, I would like to relate some personal experiences of my business that just may explain why subcontractors are interested in S. 2153. Everyone in construction is concerned with safety. However, as a company specializing in the use and sale of millions of pounds of dynamite and other explosives every year, we must operate a little differently than some others in the construction business. Safety to us is not just a word that our company personnel use when an OSHA inspector comes around, and safety is certainly not a topic that we discuss only after an accident occurs. Safety to us is simply an integral part of our everyday business. It is as much a part of our business as manpower, equipment, and supplies.

Not only can our business not exist without incorporating safety in our every thought and every action, but our very lives depend upon it.

Now, the Occupational Safety and Health Act of 1970 requires employers to furnish to each of their employees a place of employment free from recognized hazards that are causing or are likely to cause death or serious harm.

I would like to tell you today that I personally, as president of Explosives Engineers, Inc., do not furnish a place of employment free from recognized hazard. My company employs over 45 people to work on 10 to 15 different worksites every day and over a six-State area. It is physically impossible for me personally to furnish a place of employment totally free of all hazard, especially since our people are handling explosives. However, I, with our supervisors working with all our employees, do provide a place of employment that is as free of recognized hazards as is possible when working with explosives.

But it is only because our employees want to work safely and do work safely that our place of employment remains relatively free of recognized hazards. It is our employees, performing their work in a safe and efficient manner, that help provide our safe workplace. And because our employees are conscientious and truly interested in the wellbeing of other people and the welfare of the company itself, we have an excellent safety record.

Yet even with our safety record, we are still subjected to OSHA inspections almost monthly. We, like the many other subcontractors, are on so many different construction sites when other contractors are being inspected by OSHA, and since we have to advertise our presence by posting large warning signs, we are always quite visible to the compliance officer. Many inspectors visit our work area out of curiousity to see what explosives look like and do not formally report it as an inspection. But we are continually inspected by compliance officers who have never seen a stick of dynamite and have absolutely no expertise in the use of explosives. They can only observe our operations while they search through the OSHA manual, looking for some little standard that we may just possibly be violating.

Now, OSHA has placed great emphasis on recordkeeping, and requires all employers to keep extensive records. If OSHA would recognize those companies with good safety records, as shown on the very records now required by OSHA, refrain from the many routine inspections of those proven safe workplaces and instead concentrate their efforts on those employers known to operate unsafe workplaces, OSHA would then help many employers improve their safety records.

It is obvious that the present OSHA system is not working. Serious accidents in the workplace continue to climb. It is a proven fundamental concept that punishment or threat of punishment alone does not provide motivation for positive results, but often creates just the reverse effect. Let us redirect OSHA's efforts to rewarding those who are successful in achieving a safe work record instead of just punishing those who fail to achieve a perfect safety record. OSHA will then be in a position of working to promote safety instead of merely acting as a policeman seeking out and punishing violators of safety standards.

ASA has observed some problems contained in the language of S. 2153. We have spelled them out in our written testimony. We feel that some terms could be better, more clearly defined.

We also question whether the table of workdays lost for determining inspection exemptions is equitable to all industries. Clearly, a different standard should apply to an office with 15 employees than to a construction site with 15 employees.

ASA suggests that a separate eligibility table be developed for different industries.

In conclusion, may I reiterate the support of my association for S. 2153. We would, however, ask for more specific definitions in certain sections of the bill. We do believe that this legislation is an important first step toward reforming the occupational safety and health system in America.

Thank you, and either I or Mark Ward will be glad to answer any questions later.

[The prepared statement of Mr. Matthews follows:]

ASA

STATEMENT OF THE
AMERICAN SUBCONTRACTORS ASSOCIATION
IN THE MATTER OF THE

OCCUPATIONAL SAFETY AND HEALTH
IMPROVEMENTS ACT OF 1980

SUBMITTED BY
DONALD MATTHEWS
ASA SAFETY COMMITTEE CHAIRMAN

APRIL 15, 1980
WASHINGTON, D.C.

STATEMENT OF THE AMERICAN SUBCONTRACTORS
IN THE MATTER OF THE
OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980

At the outset, let me express my appreciation for the opportunity to testify before this panel. I hope you will find my statements in support of S. 2153, the "Occupational Safety and Health Improvements Act of 1980," useful in your consideration of this important legislative reform.

My name is Donald Matthews, founder and President of Explosives Engineering, Inc., a blasting and demolition firm from Sparks, Maryland. My professional affiliations also include the International Society of Explosives Engineers, of which I am President. However, I address myself to you this morning as a representative of the American Subcontractors Association, where I am chairman of the ASA Committee on Construction Safety.

In the matter of definitions, subcontractors are the practitioners of specialty trades such as plumbing, masonry, plastering and excavation. Ordinarily, we are hired by a general contractor to perform the many specialized tasks that make up some 85 percent of the construction work on an average jobsite. ASA is unique in that it represents subcontractors of all trades, an estimated one-half million firms nationwide.

Construction is an industry where safety is an especial concern. Therefore, we view this legislation, S. 2153, with great interest. For myself, as chief executive officer for a company specializing in the use or sale of millions of pounds of explosives each year, safety is not just a word that our company personnel use when the OSHA inspector comes around. It certainly is not a topic that we discuss only after an accident occurs.

- MORE -

Safety is just as much a part of our business as manpower, equipment and supplies. Our business cannot exist without incorporating safety in our every thought and action. Our very lives depend on it.

ASA supports the passage of the OSHA Improvements Act for three reasons: First, by dangling the carrot of exemption from costly OSHA inspections, as a reward for good safety records, the bill provides employers with incentive for self-improvement in this area. Second, we believe this bill would effect significant savings in the cost of compliance with government regulations, savings which can be passed on to the consumer. And third, we believe this bill would enable OSHA to concentrate its limited resources on areas where grave hazards exist.

To illustrate our first point, permit me to cite some figures from the National Safety Council. Since 1971, when OSHA was established, the number of serious injuries has increased by 25 percent throughout American work places. Furthermore, the severity of those injuries as measured by the total number of work days lost is up by more than 34 percent. Let me assure you that ASA is not laying a case for the repeal of OSHA. However, we do feel these statistics demonstrate that the adversary approach is not working. In fact, during the eight-year period prior to 1971, the National Safety Council reports that serious injuries and fatalities were on the the decline. In our opinion, this shows a creditable track record for self-regulation by business. After all, it is in our best interest!

The second important reform we see with the passage of S. 2153 is a significant reduction in the cost of businesses complying with government safety regulations. The United States Chamber of Commerce estimates that in the nine-year history of OSHA, these compliance costs have amounted

- MORE -

to $25 billion. The construction industry, by its very nature, has probably shouldered a disportionate share, compelling builders to charge higher prices for residential and commercial building. But the savings that resulted were OSHA Improvement Act to become law could be passed on to consumers.

And finally in regard to our third point, it is our opinion that these new performance-based standards would enable OSHA to concentrate its limited resources to areas where significant problems exist. In my own experience, the problem of nit-picking by OSHA inspectors has been widespread. Since, as an explosive firm, we are required to advertise our presence by posting large warning signs, we are always quite visible to these officials. Often they visit out of a curiosity to see what explosives look like. Fortunately, a citation is seldom issued, but this does not absolve us of the harrassment of these excessive inspections. OSHA should recognize those companies with good safety records, even as shown on the very records now required by OSHA, and refrain from the many routine inspections of those proven safe work places and concentrate their efforts on those employers known to allow employees to work in an unsafe manner.

However, ASA has observed some problems contained in the language of the bill. Specifically, the term "imminent danger" should be defined in precisely the same manner as it is defined in Section 13 (a) of the orginal Act, and cross-referenced to 13 (a), rather than defined as it is in Section 4 (A) (a) (1) (B). This may lead to confusion as to whether Congress intended a different standard to apply in S. 2153 or whether it intended that "imminent danger" means the same as in the original Act.

Another problem can be seen in Section 4 (A) (a) (1) (C), since questions could be raised as to what standards are to be applied to the employer's

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"assurances." What constitutes a "satisfactory" or "unsatisfactory" assurance under this Section? A more objective standard should be used, lest OSHA, through its rule making power, misinterpret the intent of Congress.

Most importantly, it is unclear as to what Section 4 (A) (a) (2) has reference. To what hazards does the drafter make reference? What does "effectively" mean? This Section must be cleared up for it in effect exempts OSHA from the workings of the entire bill. Any exception to "effectively identified" hazards must be clearly defined.

ASA would also question whether the table of workdays lost, for determining inspection exemptions, is equitable to all industries. Clearly, a different standard should apply to an office with 15 employees, than to a construction site with 15 employees. My own company employs more than 45 persons who work on ten to fifteen different worksites daily in six different states. Would workdays lost on one site disqualify my firm for an exemption at all other sites? ASA suggests that a separate elibibility table be developed for different industries.

In conclusion, may I reiterate the support of my Association for S. 2153. We would, however, ask for more specific definitions in certain sections of the bill. We do believe that this legislation is an important first step toward reforming the occupational safety and health system in America.

Thank you for your attention, and at this time my associate, Mark Ward, ASA Director of Public Relations, and I will be happy to answer any questions that you may have.

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Senator SCHWEIKER. All right, we will proceed to Mr. Robert Griffith, vice president of the National Utility Contractor Association.

Mr. GRIFFITH. It would appear that Mr. Matthews and myself are the only two to testify here today who have actually had OSHA inspections and have firsthand knowledge.

Senator Schweiker, my name is Robert Griffith. I am president of R. G. Griffith, Inc., a northern Virginia utility contracting firm, and I am a vice president of the National Utility Contractors Association (NUCA). NUCA is an organization representing firms involved in underground construction activities. With me, on my left, is Don DeHart of Indianapolis, Ind., a safety consultant for NUCA. We appreciate the opportunity to appear before you today.

As chairman of NUCA's safety committee for the last 3 years, I can speak firsthand of the deep and continuing concern that the more than 2,400 members of our association have for jobsite and employee safety. It was through the efforts of our safety committee that Don DeHart was hired to work with our 39 chapters and individual contractors across the country to help solve safety problems and make the workplace safer for our employees. As a matter of fact, we have applied for an OSHA grant under the new directions program which would enable us to greatly expand our safety training program. We are hopeful that our grant application will receive favorable consideration.

We strongly agree with the stated objectives of S. 2153—to focus on results rather than enforcement and compliance procedures, and to encourage the private sector to do the job before the Government has to take action. We applaud the Senators for their efforts in drafting S. 2153.

We believe the basic idea of the bill, to hold out a carrot to employers, is a good concept. In effect the legislation tells employers if they have a safe workplace they will be exempted from OSHA inspections. However, we feel the legislation needs some modification.

Unless the goals for OSHA inspection exemptions are attainable for safety-conscious construction contractors, there will be little or no incentive for contractors to attempt to comply.

In fact, if the goals are unattainable for large groups of employers such as contractors, these goals may actually defeat the purpose of the bill. We thus feel that the final legislation, to be realistic and effective, must treat major industries differently. Standards must be set industry by industry because of varying industry conditions and experience ratings.

Should OSHA inspect people who are in a so-called hazardous industry but have a safety record that far surpasses the industry average or even all business? No. Certain industries, construction being one, will have unavoidable, though not necessarily serious, accidents, because of the nature of the work being done and the human factor. The site could be as safe as this room, but accidents could still happen. Just as Congress can't legislate morality, neither can it legislate human behavior.

How will increased OSHA inspections of contractors with good safety records help make working conditions safer?

We believe increased employee safety training will reduce accidents and injuries, not increased inspections. Are OSHA inspectors finding violations when they inspect these job sites of safe contractors? Generally, no.

We have examples of such contractors with extremely good safety records who, when inspected by OSHA, were found to have either no violations or inconsequential nitpicking problems which did not endanger the safety of the workers.

So what did OSHA gain from inspecting the safe contractor? Nothing. OSHA simply caused more lost productivity and created additional costs for the inspected contractor, costs which will eventually be passed on to the consumer.

There is probably very little, if anything, OSHA can do to change the quality of work safety for the individual or businesses which are already safe.

Finally, we are at this time compiling data from the member companies of our association which we would like to present to this committee at a later date, on what we believe would be realistic and attainable criteria for OSHA exemptions in our industry. We would be pleased to meet with this committee to share the results of that information.

Thank you for your kind attention. Mr. DeHart and I would be glad to answer any questions which you may have.

Senator SCHWEIKER. This question is for Mr. Matthews, but if any of you wish to comment, you may.

Mr. Matthews, you suggest on page 4 of your statement that we should better define the term "satisfactory assurances" in the section of the bill that permits OSHA to conduct complete inspections in safer workplaces for nonurgent problems.

If the employer has been given a chance to correct the problem but has failed to provide OSHA satisfactory assurances that it has been corrected, then OSHA would, under the bill, inspect. Let me explain what I have in mind and see if you agree.

When OSHA people receive the employer's reply, they will check back with the employee who made the complaint. Then the test would be the same as the law now provides, that if OSHA still has the reasonable grounds to believe there is a problem, they will inspect. I don't know whether you agree with that test or not, or maybe you have some other suggestions as to the way we define "satisfactory assurances."

Mr. WARD. My name is Mark Ward, ASA public relations director. I would like to answer that question.

We support S. 2153, because we believe it is a very important first step, and whatever the assurances are defined as we think that it is better than the current situation. We raised this point, which was discovered by our legal counsel, just in the matter of suggestion. We feel that a more specific definition might obviate or circumvent the problem of OSHA liberalizing the intent of the law by interpreting a vague definition.

So we feel that the situation you just described sounds like an improvement, a good first step to us. Perhaps you might want to consider writing it into the legislation.

Senator SCHWEIKER. Mr. Griffith, you recommend the safety record test in the bill be changed to be based on industry averages rather than overall national average. To support this you say that OSHA can do very little to improve safety in workplaces that are well below their industry average, and also that OSHA inspectors now generally find no serious violations in these workplaces.

Do you have any examples or information to support that?

Mr. **Griffith**. I am going to let Mr. DeHart answer that. I think he has some information on that.

Mr. **DeHart**. My name is Don deHart. I operate as safety consultant for the National Utility Contractors. We had a conference telephone committee meeting on Friday discussing this bill, and afterwards I picked up the telephone and called a few of the contractors in our association that I have worked with in the past year. I knew these companies to have good safety programs, with safety directors and ongoing training programs in their company. I called them, and I would list their names now as examples, seven contractors that I called: H. J. Schneider Construction Co. of Pittsburgh had three investigations last year, one violation which was reviewed, the fine was reduced in half, he appealed it and it was later thrown out and there was no fine imposed. The violation was for shoring or lack of shoring in a trench. There were no workers in the trench at the time and they were moving the box over to set it in. They eventually won it, but it took time and money to have it thrown out. They have a very good safety program with a safety director.

Suburban Grading & Utilities of Norfolk, Va., had three inspections last year with no fines imposed.

Thompson Construction had two inspections, no fines imposed—they are out of Indianapolis, Ind.

Ole Hansen & Son, out of Pleasantville, N.J., had two inspections with no serious citations. They were the winner of NUCA's national safety award of 1979.

Corrado Brothers of Wilmington, Del., had no citations and no fines imposed.

Hoosier Fence Co. of Indianapolis, Ind.—not a member of NUCA, but a member of our State affiliate association—won the Indiana State Safety Award in 1979, had two inspections with no fines or citations imposed.

And the gentleman to my right, R. G. Griffith, Chantilly, Va., had three inspections with no violations and no fines imposed.

These were just calls I quickly made. We are, as Mr. Griffith mentioned, polling our membership right now to get more complete information. But this was a quick long-distance call to several contractors I knew had good programs.

Mr. **Griffith**. I might point out on the three inspections he speaks of that my company had, we were written up on two serious violations, one on each job, but they were written in error. We proved that these violations were mostly nitpicking, that I spoke of before, and they were not serious violations and were thrown out, one being a cable which had some fray in it. The cable was more than capable of lifting what we were lifting. But they called it a serious violation. That was thrown out.

The sloping of a trench—the inspector measured wrong and came up with the wrong computations, and we proved that to be a wrong citation.

Those were two, and the other one was strictly nitpicking, I won't get into that.

Senator SCHWEIKER. Senator Williams has a few questions he would like to submit in writing. If you will cooperate, we would appreciate it.

Mr. GRIFFITH. Senator Schweiker, could I have this entered into our testimony with our testimony? You have copies of this.

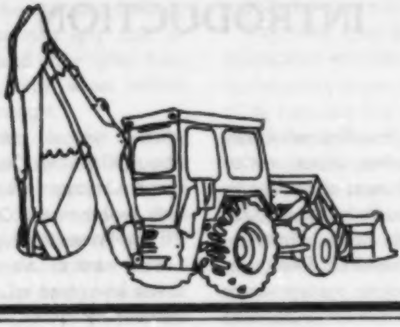
Senator SCHWEIKER. What is that?

Mr. GRIFFITH. That is a booklet called "Characteristics of Utility Construction Firms and Their Relationship to Job Safety."

That is a report which our national association had prepared.

Senator SCHWEIKER. We will put it into the record.

[The following was received for the record:]



CHARACTERISTICS OF UTILITY CONSTRUCTION FIRMS AND THEIR RELATIONSHIP TO JOB SAFETY

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INTRODUCTION

Earlier this year, the National Utility Contractors Association, in conjunction with the National Bureau of Standards, sent out a questionnaire to about 2,000 contractors who do work which involves trenching operations. Responses to this multi-question survey were received by 223 contractors from more than 40 states across the country, with all geographic areas of the country represented. Some, however didn't answer every question.

The survey results will be used by the National Bureau to develop recommendations for revising OSHA's trenching and excavation standards. Respondents were primarily utility contractors. More than half of the forms were completed by company presidents and owners. Most of the remaining responses were completed by upper management personnel.

The following statistics were tabulated from the respondents completed forms. More details and their relation to safety practices and performance will be reported in subsequent issues.

Of the total respondents, 46% reported an annual volume of less than $2 million with another 33% in the $2-$5 million range. An additional 9% did between $5 million and $10 million with 6% reporting between $10 and $20 million. Six percent of the participants were in the over $20 million category.The typical company had a volume of about $ 2 million.

16% of the participating firms reported 10 or fewer field employees; 13% had 100 or more field employees.

The typical company employed about 30 field workers with the employment varying, due to the seasonal nature of the work, from a low of about 16 employees to a high of 50.

The union versus merit shop breakdown was split almost down the middle with 44% working union, 46% working merit shop and 3% reporting double-breasted operations. 8% didn't answer this question.

Regarding questions on competitive bidding, nearly three-quarters said that 90% or more of their company's work was obtained through competitive bidding. Only 5% reported they got a quarter or less of their work through competitive bidding.

In a question that had a significant impact on the safety conclusions of the study (to be explored next month), nearly one-third of the firms said that more than 60% of their workers regularly visited the home office premises. Another third said that 20% or less of their workers regularly visited the office.

The typical size of the survey participant was also reflected by a question exploring a typical firm's geographic range. Nearly one-fifth of the companies answering did 90% or more of their work within a 25-mile radius of their home office. Some 15% were on the opposite end of the scale and did 10% or less of their work within 25 miles.

Tabulations show that 24% give detailed cost information to their foreman while 30% only give a rough idea of what is in the estimate. 24% do not give their foreman any cost information. 15% said they give them some information only when behind schedule or over budget.

Regarding visits to the jobsite, another key factor in safety performance, 36% of the respondents said the company president or owner visits most jobsites daily, while another 17% said the sites were visited three times a week. In 19% of the cases, the owner or president visited most jobsites twice a week. 15% reported the frequency of visits to be once a month or less.

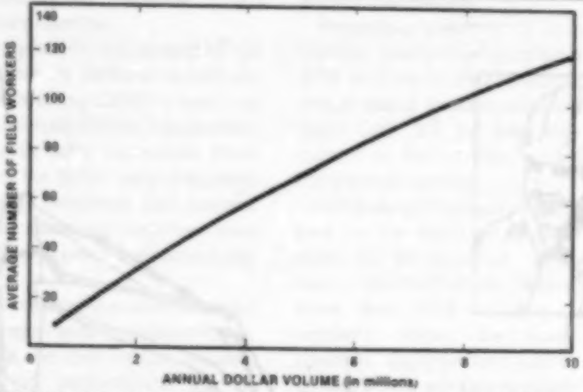
The most prevalent type of communication with jobs was personal visits to the job by home office people (57%). 51% reported that most jobs have CB radios for home office communications while half said telephones were available on most jobs. 39% said top management was stationed on the job.

With regards to the question on pension funds, 52% of the companies had a pension fund or profit sharing plan for the field workers.

HOW DOLLAR VOLUME CHANGES A COMPANY

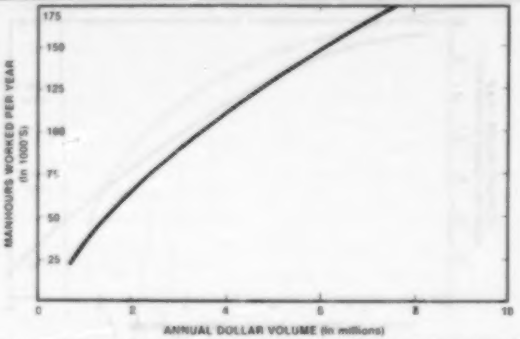
Upon closer examination of the data found in our previous survey, further interesting findings were discovered. One set of findings concerned the relationships which exist between the annual volume of business conducted by the contractors and various company characteristics. That is, the findings showed how companies doing different volumes of business tended to have different characteristics.

A brief discussion of each general relationship is explained and general conclusions have been made. Since most contractors (over 90%) had annual volumes of less than $10 million, only that segment of the industry is discussed.



ANNUAL DOLLAR VOLUME VS. AVERAGE NUMBER OF FIELD WORKERS

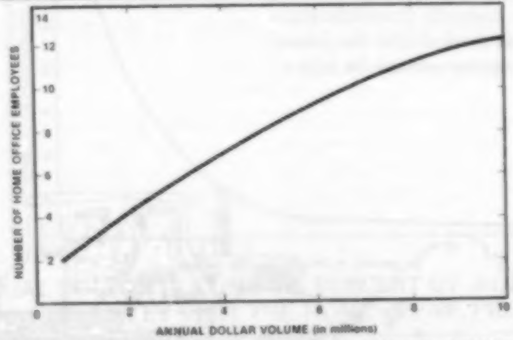
Number of Workers—The obvious conclusion from this information is that the larger contractors (as defined by annual dollar volume) employ larger numbers of field workers to sustain their annual volume of business. Contractors with an annual volume of $1 million employed about 15 workers, contractors with $2 million of annual work employed from 25 to 30 workers and firms with a $4 million volume employed about 30 workers. Firms with an annual volume of about $8 million employed about 100 workers. Thus a firm with $8 million of work employed substantially less than twice the number of workers that would be employed in a firm with a $4 million volume. One possible explanation is that larger firms begin to subcontract more of their work, consequently, reducing the company requirements on the number of field workers.



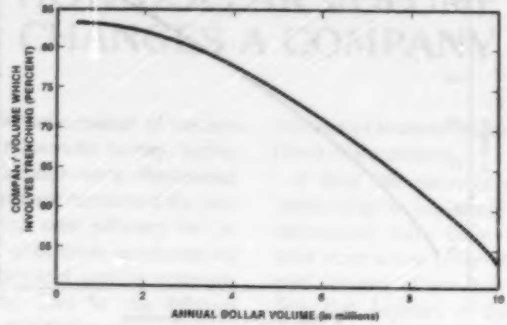
ANNUAL DOLLAR VOLUME VS. NUMBER OF MANHOURS WORKED PER YEAR

Number of Man hours Worked—This is closely related to the previous findings. Comparisons of the number of workers and man hours worked show that most field workers work about 1800 hours each year. In those firms with annual volumes of less than $2 million, however, the field workers generally worked close to 2000 hours each year. This relates somewhat to another finding (not presented here) that showed that the turnover rates in smaller companies is lower.

Number of Home Office Employees—The results show that firms with annual volume of $1 million employ 2 or 3 home office employees, contractors with a $2 million volume have up to 4 such employees and volume of $4 million are associated with around 6 home office employees. Most contractors with annual volumes of greater than $5 million have more than 10 employees in the home office.



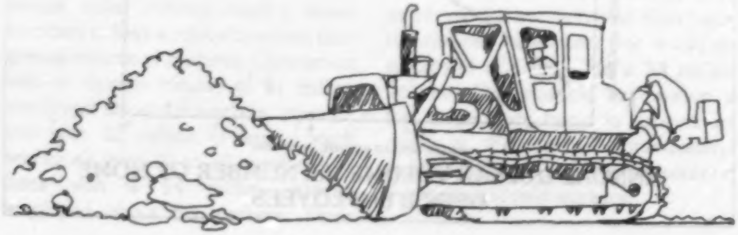
ANNUAL DOLLAR VOLUME VS. NUMBER OF HOME OFFICE EMPLOYEES

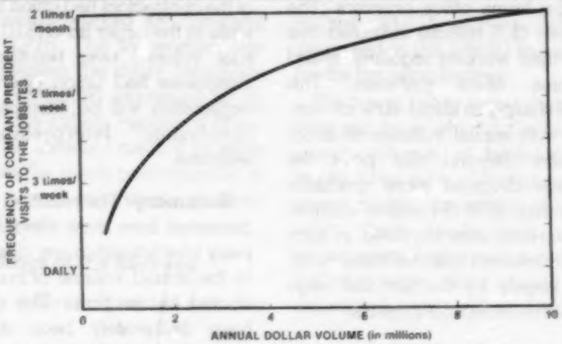


ANNUAL DOLLAR VOLUME VS. PERCENT OF COMPANY VOLUME WHICH INVOLVES TRENCHING

Amount of Company Work Involving Trenching—On the average, most small contractors (less than $2 million annual volume) had trenching comprising at least 80% of their annual volume of business. There is a steady decline in this percentage as the sizes of the firms increase. The implication, of course, is that firms tend to take up other endeavors of contracting (other than trenching) as their volume of work increases, i.e., larger firms become more diversified in their operations. This trend towards diversification becomes most marked after the annual volumes of business exceeds $4 million.

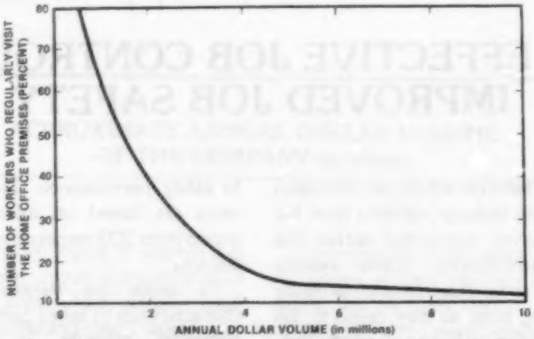
Percentage of Jobs Within 25 miles of the Home Office—Results show that the larger firms have a smaller percentage of their jobs within 25 miles of their home office. Larger firms apparently obtain more jobs which are more distant in order to sustain their volume of business. The results are most striking for contractors with annual volumes of no more than $1 million. These had at least 60% of their projects in this relatively small radius.





ANNUAL DOLLAR VOLUME VS. FREQUENCY OF CO. PRESIDENT VISITS TO THE JOB SITES

President Visits to the Jobsites—Contractors were asked how frequently the company president (or owner) visited the job sites. This frequency declined as the volume of work increased. This decline is particularly marked between those firms having annual volumes of $.5 million and those having annual volumes of $2.5 million. Beyond that volume, the frequency of visits declined at a slower rate. The less frequent visits might be expected in larger firms since they probably have more projects, the greater portion of which are located at greater distances from the home office. In some very large firms such visits may never occur.



ANNUAL DOLLAR VOLUME VS. PERCENT OF WORKERS WHO REGULARLY VISIT THE HOME OFFICE PREMISES

Worker Visits to the Home Office Premises—Related to the previous topic, the contractors were asked what portion of their field workers regularly visited the home office premises. The small firms ($.5 million) indicated that 80% of their workers regularly visited the home office premises. This dropped sharply to about 40% for contractors with annual volumes of about $2 million. Beyond that point the percentage dropped more gradually until less than 20% ($4 million volume) of the workers were involved in such visits. It is inferred that this trend is explained largely by the fact that large firms have more remote projects.

Union vs. Merit Shop Operations—Contractors were asked if they had a union or merit shop operation. (Note: about 8% of the contractors did not respond to this question). Double-breasted firms were not included in this tabulation. Results showed that more firms were unionized as their volume increased. For very small firms ($.5 million annual volume) about one third of the contractors had union operations, while in the larger firms ($10 million annual volume) over two-thirds of the companies had union operations. No explanation will be attempted for this conclusion. Interpretations are welcome.

Summary: The results of the survey presented here show that several company characteristics are closely related to the annual volume of business conducted by the firms. The conclusions have deliberately been stated in a general sense. Individual contractors may find that their operation is closely defined in these results, or they may find that their operation differs a great deal from the "typical" contractors in the same volume range.

Most of the findings presented in this paper will be referenced in the December issue when the particular effects of several variables on safety performance will be considered.

EFFECTIVE JOB CONTROL IMPROVED JOB SAFETY

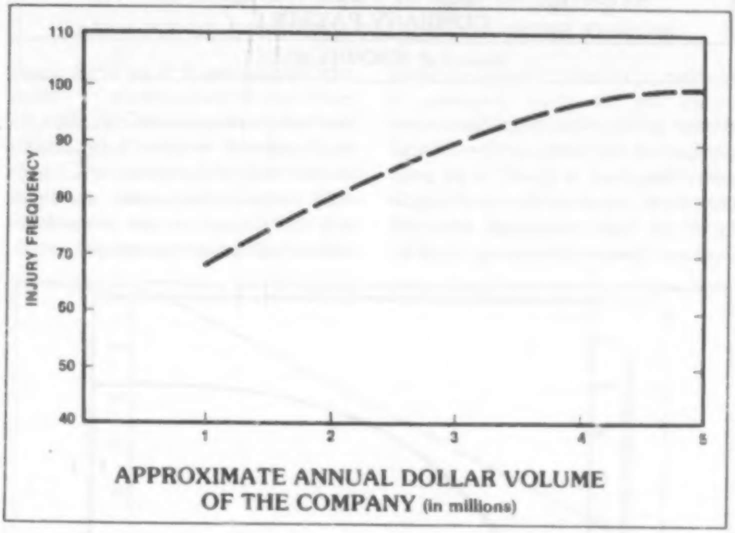
In the previous article we discussed some of the findings resulting from the NUCA survey conducted earlier this year. Specifically, those results described some characteristics of utility contracting firms as they relate to the annual dollar volume of work conducted. In this article those same characteristics will be discussed further, but rather than relating them to the volume of work done they will be discussed in terms of their relationship to safety performance. These conclusions are based on information obtained from 203 responding utility contractors.

To relate the various company characteristics to safety performance, a consistent measure of such performance was needed. This was obtained from two pieces of information: the number of OSHA recordable injuries that occurred to company workers in 1976 and the number of field manhours worked by company forces in 1976. This information was used to establish the injury frequency for each contractor, expressed as injuries per one million manhours of exposure. This measure made it possible to compare the safety performances of different firms, regardless of their volume of work.

The Findings of the Surveys

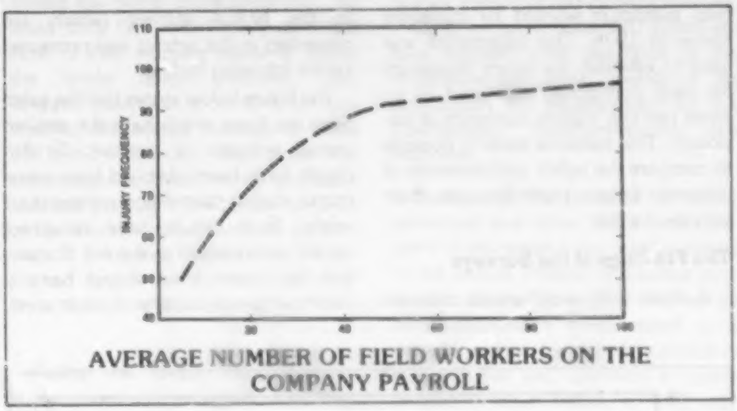
A closer analysis of the data collected in the NUCA survey (which are presented in this article) was prompted by the following finding:

The figure below shows that the safer firms are those which have the smaller annual volumes of business. Similar results have been obtained from other recent studies concerning construction safety. Such results have remained largely unexplained as it is not obvious that the larger firms should have a disproportionate number of job injuries.

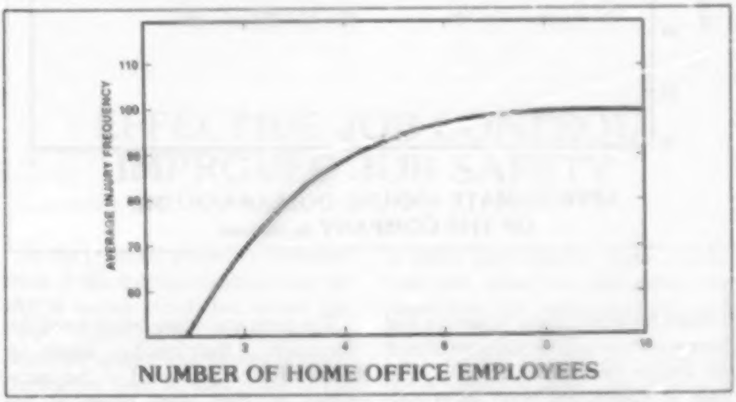


It might be more logical to assume that there are some unique characteristics of the smaller firms which actually assist them in maintaining good safety performances. (Note: the following discussion will present general findings. In all cases, it should be noted, that exceptions were encountered. Nonetheless, the conclusions are based on statistically significant data.)

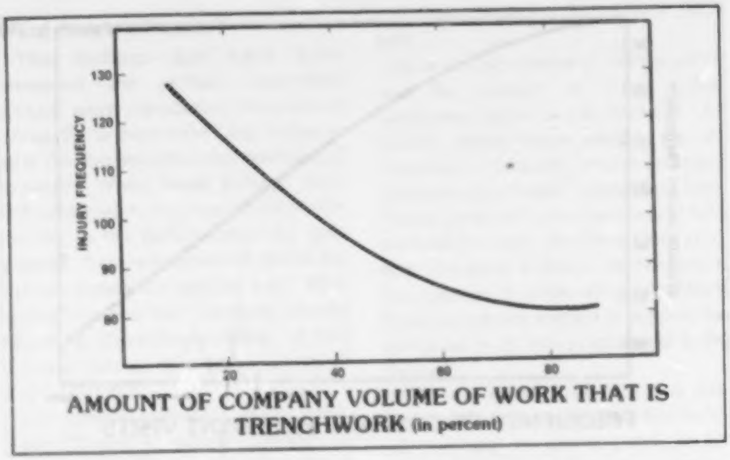
The company characteristics and the discussion of their resultant impact on safety will be presented in the same order as they were given in the previous article. These findings will be presented initially in a very brief fashion, and a summary will follow which will discuss broader implications of these findings.



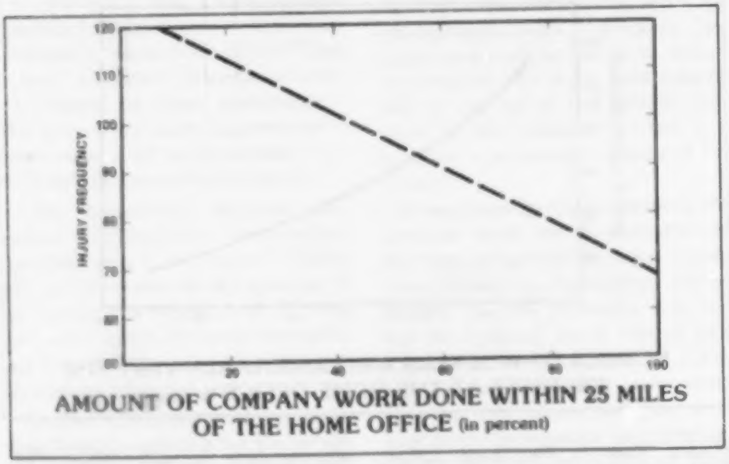
Number of Workers: The above figure shows that the injury frequency is greater in those firms which have larger numbers of field workers. The average injury frequency is about 50 for companies with less than 10 workers and up to 95 for those companies with 100 workers. There is little change in the injury frequencies of those firms having more than 60 field workers, i.e., the injury level remains fairly constant once the number of workers approaches a certain level. It should be noted that a very similar curve resulted when plotting the actual number of manhours worked with injury frequency.



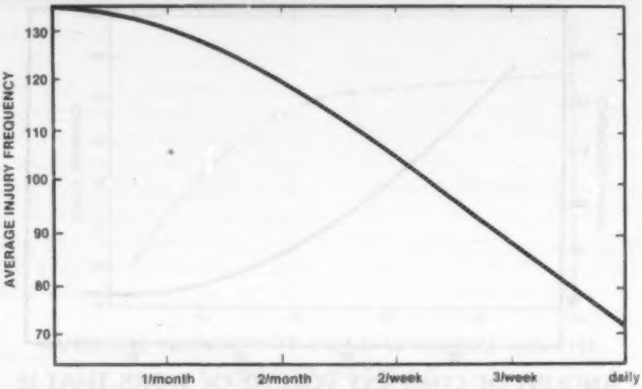
Number of Home Office Employees: Consideration of the number of home office employees shows that the injury frequency increases as the number of such personnel is increased. The average injury frequency changes from a low of about 60 injuries per million manhours for 2 home office employees to a high of about 100 injuries per million manhours for 10 home office employees.



Amount of Company Work Involving Trenching: This figure indicates the impact that project diversification can have on safety performance. Those contractors with at least 60% of their dollar volume of business in trenching had considerably better safety records than those firms which had more diversified jobs. This was particularly pronounced for those firms which had trenching jobs comprising less than 20% of their annual volume.

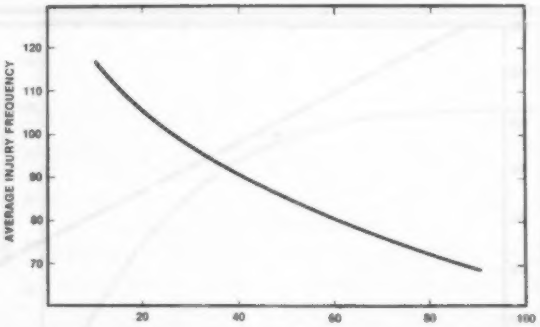


Percentage of Jobs Within 25 Miles of the Home Office: Results show that the safer firms are those which have a greater percentage of their jobs within a 25 mile radius of the home office (this is nearly a straight line relationship).



FREQUENCY OF COMPANY PRESIDENT VISITS

President Visits to the Jobsites: The above figure shows that company presidents (or owners) have a substantial influence on safety performance simply through the frequency with which they visit the company jobs. Companies were much safer when daily visits or when several visits a week occurred on the jobs.



NUMBER OF WORKERS WHO REGULARLY VISIT THE PREMISES AT THE HOME OFFICE (in percent)

Worker Visits to the Home Office Premises: The findings showed that the safer firms were those which had a greater percentage of their workers who regularly visited the home office. The less safe companies had only, a small percentage of their workers making such visits.

What does it all mean?

The findings that have been presented are perhaps interesting enough when considering them one at a time. But is there something unique to all of the characteristics that ties them all together? When these findings were first presented to a group of utility contractors in the NUCA office this past summer, there was a general concensus that the answer is a definite "yes." What is that common tie? Everyone agreed that these characteristics were, at least to some extent, different measures of JOB CONTROL.

Job control probably means something different to different people. In general, most would agree that it is a combination of management being informed about the field operations and also being able to respond effectively to problems that arise and to problems that are foreseen. Communication is, of course, a very essential ingredient of job control. The characteristics presented in the figures will now be discussed in terms of job control. Keep in mind that safety performance is being affected by these characteristics. The point is that safety performance is better when a job runs smoother, i.e., *Job Safety* is affected by *Job Control*.

One characteristic discussed concerned the *frequency of company president visits to the jobsites*. Clearly this can be considered as a measure of job control in a typical sense. A president who visits a job more frequently has a ready knowledge of what is happening on each of his jobs.

Another characteristic relating more directly to job control is the *percentage of jobsites within 25 miles of the home office*. The close proximity of company projects to the home office clearly makes it a simpler physical task for company managers to monitor such jobs.

How do the *number of field workers* and the *number of home office employees* relate to job control? Obviously where more people are involved in a company, we are probably considering a larger contracting firm. That is, firms with large numbers of field workers probably also have more projects. The same is true of an increase in the number of home office personnel. More people are needed to support the additional work being performed in the company.

The owner of a small firm who runs his own jobs has a very good feel for his job costs and can also respond quickly to job problems. As that company grows, however, the nature of that job control will change. More field workers are hired as the number of projects is increased. As a result, additional supervisors are employed. Eventually, more home office personnel are hired to handle the additional accounting and other administrative duties. Obviously that single owner will be unable to control the company jobs in the same manner that he did before that growth took place. So the number of workers in a company is an indirect measure of job control.

It was shown by the discussion in the previous article that *diversification of the types of projects* done by a company increases as the company size increases. A utility contractor may find that the company has to take on jobs which are unrelated to trenching, just to keep the equipment and crews working. This often means taking on work over which the company has limited expertise. Naturally, job control on those jobs would not be as effective.

How do *worker visits to the home office* provide any help in job control?

Where such visits are common, one would suspect that the jobs are near to the home office. The reasons for these home office visits were not determined but they could result from the workers using the home office as a base for carpooling. Such visits would also occur when the storage yard is located at the home office site. Certainly such visits mean that management people can become fairly familiar with the field workers. This, in turn, helps to open up communication lines between the home office and the field. That communication link could be a very essential ingredient of job control.

Why does job control have such an impact on safety?

The findings of this survey probably don't seem so strange after all these characteristics are considered as being related. The obvious conclusion might be that good job control should logically have a favorable impact on safety. If job control is effective, then the field work should progress smoothly. A smooth-running job, in turn, should be a safe-running job. It all goes hand in hand.

How does company size affect job control?

The findings presented herein have shown several factors (generally existing in small firms) which have a favorable impact on safety. But how does this information help a larger contracting firm that does not have most of these "favorable" characteristics? Likewise, if a small contracting firm is growth-bound, is it also destined to lose these beneficial characteristics?

These findings should not be construed to mean that all firms should remain small if they wish to remain safe. The important point is that firms with different annual volumes of business are also different in several other respects. These differences, if not recognized, could have an adverse impact on job control and job safety. Safety has to be dealt with in a manner which reduces job accidents. In small firms, it has been shown, this is accomplished through effective job control.

What should large or growing firms do? Obviously, the large firms are unlike the small ones in many ways. Although job control is not the same in larger firms, it perhaps still has a very strong impact on job safety. Effective job control is essential to good safety performance, regardless of the actual nature of job control.

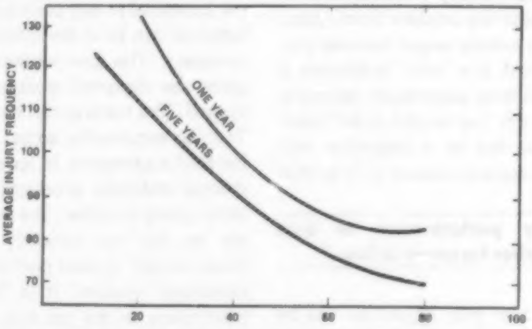
As mentioned earlier, exceptions to the conclusions drawn in this article were found in the data. That is, there were some small firms that had very poor safety records and also some large firms that had exceptionally good safety records. This survey did not find all of the answers to questions concerning construction safety, but it did find some enlightening information about job control and its effect on job safety.

WORKER TURNOVER AND JOB SAFETY

In the previous article we presented some findings resulting from the survey conducted by the NUCA office early last year. That article discussed several company practices, and how they were related to safety performances. The conclusion was that the degree of job control exercised by the company managers had a considerable impact on the frequency of injuries in the company, i.e., safety performance is good when job control is most effective.

There was one additional finding, not presented in that article, that linked safety performance with the degree of turnover of the field employees. These results were so dramatic that it seemed appropriate to present them separately. The figure below presents this finding. Results show that the safer contractors are those who keep a larger percentage of their workers for over one year and this was also true for contractors keeping a larger percentage of their workers for over five years, i.e., safety performance is best when worker turnover is low.

The figure presents two related items of information. The upper curve shows the percentage of the workers that the contractors have employed for over one year. It is surprising to note that several contractors had over 90% of their workers with them for more than one year, with a few indicating that all (100%) of their workers had been employed for that duration. At the other extreme, there were some contractors who had kept only 20% of their workers for a year. The lower curve shows the percentage of workers that the contractors kept employed for over five years. Note that several contractors put this figure near 80%. The figure (both curves) shows that a substantial number of workers are retained by the contrac-



NUMBER OF WORKERS WHO HAVE WORKED CONTINUOUSLY FOR THE SAME FIRM FOR A GIVEN PERIOD OF TIME (in percent) tors from year to year. These figures seem to be well above the national average for the construction industry.

The findings show strikingly the impact that the continuity of field worker employment can have on safety performance. This can of course be interpreted as being at least somewhat analogous to the degree of turnover in a company. For example, a contractor who has 90% of his field people for over a year is faced each year with training the new workers who comprise the remaining 10% of his crew. If the crew size is considered as being constant from year to year, then there has been a minimum of 10% annual turnover in the contracting firm. A contractor with only 20% of his field workers being with him for over a year, on the other hand, is faced with a situation where at least 80% of his crew consists of new people. Turnover in this instance would be at least 80% per year.

Turnover obviously means that new people are brought into the company. These people must be trained. It is common knowledge in the industry that the new people are the ones to watch out for in regard to safety. At the same time, these are also the workers from whom contractors initially expect the least production. Even if a "new" employee is well-trained from experience gained in a previous job, that worker is still "new" in the sense that he is unfamiliar with both the company manner of operation and the crew with whom he will be working. This "newness" on the job makes him more susceptible or vulnerable to injury. A smooth operation cannot be fully expected until all crew members have assimilated themselves with their work environment.

". . .safety performance is best when worker turnover is low."

Consider turnover in the context that the quality of *communication* between the home office and the field is a measure of job control. Turnover seems to be very relevant. A worker who has been with a company for a long period of time, say over a year, has a working knowledge of how the company operates and how things should generally be done. Such workers can be left to themselves much more and they will probably be quite productive. The newly-hired workers, however, are often "lost" and don't know what should be done next, particularly in small crisis situations. Since the "older hands" have better control over their work and since they are more capable of functioning independently, their projects should logically progress more smoothly.

"So turnover affects productivity and, as shown by NUCA survey, it has a strong impact on safety."

In summary, a high turnover rate is not beneficial to any contractor. In fact, turnover can be a disruptive force in a company. The new workers, who replace the departed workers, must be trained. This training can be expensive. Training requires the added attention of the field supervisors. In spite of this additional attention, productivity is most likely going to suffer. The projects simply do not run smoothly when the crews consist, at least partially, of inexperienced workers. It is this smooth functioning on the job that, in turn, is essential to good safety performance. So turnover affects productivity and, as shown by NUCA survey, it has a strong impact on safety.

Senator **Schweiker**. I want to say again that we appreciate your patience and perseverance, our being so late today. We normally do a little better job in getting our witnesses through, but because of the highly controversial nature of this bill, it seemed to prolong the questioning somewhat.

So we appreciate your perseverance.

Mr. **Griffith**. Thank you, Senator.

Mr. **Matthews**. Thank you.

Senator **Schweiker**. We will recess until 9:30 tomorrow morning.

[The committee recessed at 4:08 p.m.]

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OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980

THURSDAY, APRIL 17, 1980

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The committee met, pursuant to notice, in room 4232, Dirksen Senate Office Building, Washington, D.C., commencing at 11 a.m., Senator Jennings Randolph, presiding pro tempore.

Present: Senators Randolph, Cranston, Riegle, and Schweiker.

OPENING STATEMENT OF SENATOR RANDOLPH

Senator **RANDOLPH**. A pleasant good morning, ladies and gentlemen, to our guests and to those concerned individuals who are to testify.

Senator Schweiker of Pennsylvania and other members of our committee are expected to be here today.

I recall approximately 10 years ago when the chairman, I, and other members sat in this same room and conducted the hearings and markups which resulted in the Occupational Safety and Health Act of 1970. At that time some of us were very concerned about the problems of the coal miner, from the standpoint of health and safety. It had been thought that this legislation we're talking about today would be the legislative matter before us in 1969.

However for strong reasons which I believe were bona fide then and, on reflection, now—we first came to grips with coal mine health and safety and the pneumoconiosis program, a year earlier than programed.

In no sense did we place this subject on the back burner, but at the time we were considering both measures and decided that the legislation on the health and safety of the miners of the country and the need to aid them in their problems should be taken up initially. The Occupational Safety and Health Act followed in 1970.

This legislation, to use an expression which is often used, is landmark legislation. A national commitment "to assure, so far as possible, every working man and woman in the Nation, safe and healthful working conditions and to preserve our human resources was established." I am continuing to be committed to that pledge. I consider it a continuing promise to be discharged to all Americans.

I say this for myself—with a background of understanding the problems of those who toil, who work—that I helped to draft the National Labor Relations Act. That's a long time ago, 45 years. No one on the Hill was also there at that time. I remember the battle that we had to bring it into being; the right of an individual to hold membership in a labor organization; opportunity to bargain collectively with management.

As I look back, I remember the arguments then, very vitriolic in many instances, regarding the passage of the National Labor Relations Act. We had it also when we passed the Fair Labor Standards Act in 1938, which as you know followed the Magna Carta of which I just spoke for those who work in the factories, fields, and mines of America.

We must always consider while looking back and relating it to conditions now. We will listen to individuals with knowledge of matters we want to discuss—matters that concern management as well as labor, the manufacturers as well as those who perform the actual work.

We will have across-the-board testimony. Viewpoints expressed by many people with different approaches.

I am very glad that Senator Schweiker is here this morning. Before we listen to our colleague, Strom Thurmond, of South Carolina, would you care to make a comment, Dick?

Senator SCHWEIKER. Thank you very much, Senator Randolph. I would like to join with you in welcoming Senator Thurmond and our other witnesses today.

Before we proceed, I want to just briefly comment on the proposal in S. 2153 to use workers' compensation injury reports to separate firms with no lost-time injuries from those with at least one such injury.

While there are a number of questions about the mechanics of using these statistics, this is a potential source of employer-specific data which is worth exploration. Seven States now use workers' compensation data in their State-OSHA programs for inspection targeting.

In addition, 36 States have demonstrated a willingness to assist OSHA by sharing aggregate data from workers 'compensation records with OSHA under the supplemental data system. These data provide information to OSHA on the types of injuries occurring in particular industries.

A preliminary survey by the Labor Department prior to introduction of S. 2153 showed that 49 States now have employer reporting requirements under their workers' compensation programs. Forty of them require reporting by employers of the information called for in S. 2153. The other nine would need only minor additions to their employer reporting requirements to have the information we seek.

There are differences in data processing and retrieval capabilities among the State agencies, as well as other issues, such as enforcement of reporting requirements, confidentiality concerns, and the like.

To analyze these questions, and to determine the extent to which workers' compensation data can be used for OSHA inspection targeting, we have initiated a more comprehensive survey of State agencies. Answers to our questionnaires will be very helpful in the development of S. 2153.

I hope today's witnesses will also be helpful to us in considering this and the other proposals before the committee.

Thank you.

Senator **Randolph**. Thank you very much, Senator Schweiker. I think for the record we should determine who has joined you in cosponsoring your measure. Would you do that?

Senator **Schweiker**. Senator Williams, Senator Cranston, Senator Hatch, and Senator Church were original cosponsors. I have about 18 others that I'll insert in the record.

Senator **Randolph**. Thank you.

Senator **Schweiker**. We'll supply that.

[The information referred to follows:]

Cosponsors to S. 2153 as Introduced by Senator Schweiker

Mr. Williams, Mr. Church, Mr. Cranston, Mr. Hatch, Mr. Chiles, Mr. Cochran, Mr. Garn, Mr. Humphrey, Mr. Lugar, Mr. Schmitt, Mr. Tower, Mr. Wallop, Mr. Young, Mr. Boren, Mr. Hayakawa, Mr. McClure, Mr. Simpson, Mr. Boschwitz, Mr. Jepsen, Mr. Thurmond, and Mr. Bellmon.

Senator **Randolph**. Senator Thurmond comes as our first witness. I believe he's going to discuss his own measure, is that correct?

Senator **Schweiker**. I should have mentioned Senator Thurmond is also a cosponsor of S. 2153.

Senator **Randolph**. Then he comes across a broad front as we discuss these measures today.

Strom, we're very happy you're here, to receive your viewpoints. They will be very helpful to this committee.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator **Thurmond**. Thank you very much, Mr. Chairman. I would like to offer my sincere thanks to you, Mr. Chairman, and to the distinguished ranking minority member of this committee for giving me the opportunity to testify on S. 2153, and on legislation I have introduced, S. 251, a bill which provides that certain employers who successfully contest OSHA citations or penalties will be awarded a reasonable attorneys fee and other reasonable costs of litigation.

Yesterday I introduced a fairly extensive redraft of this OSHA attorneys fees bill. I would like to explain the changes which were made in S. 251, and my reasons for making such changes. But I would first like to make a few comments regarding the main subject of today's hearing, S. 2153.

I am pleased to be a cosponsor of the Occupational Safety and Health Improvements Act of 1980, introduced by the ranking minority member of the committee and cosponsored by its chairman. This legislation addresses very important issues, making changes in the 1970 Occupational Safety and Health Act which, in my opinion, are desperately needed and long overdue. I commend the authors of this reform legislation for attempting to solve some of the serious problems which have plagued this controversial agency.

The basic goal of the 1970 act was, and still is, a highly commendable and very important one—that of providing every working man and woman in the nation with safe and healthful working conditions. I agree with the statement which the distinguished chairman, Senator Williams, made at the time S. 2153 was introduced, that no civilized society should accept as the price of its goods and services the health, the limbs, and the very lives of the workers who produce them.

My opposition to the original act stemmed not from disagreement with the purpose of that act, but from concern that creating a large new Federal bureaucracy to establish and enforce standards covering almost every workplace in the Nation was not the best means of accomplishing that purpose. Unfortunately, statistics seem to bear out to some degree the validity of my original concerns.

As Senator Schweiker pointed out in his statement introducing S. 2153, for the years 1972 to 1978 injuries and illnesses resulting in lost workdays actually increased 28 percent. I find it very difficult to understand why representatives of some employee organizations so adamantly oppose changes in the status quo when statistics show that the present law has been relatively ineffective in reducing these job illnesses and injuries.

While these hearings and further consultation with interested parties may result in beneficial changes in this legislation, I believe that S. 2153 basically takes a sound approach to the problem of helping OSHA focus its regulatory efforts and utilize its limited manpower and resources as efficiently as possible.

S. 2153 seeks to implement several basic principles I believe should govern any reforms of OSHA. First of all, the bill requires the agency to maximize the benefits of its inspections by revising its enforcement priorities to concentrate on those workplaces where most injuries occur.

Second, the adversarial nature of the procedures for establishing and enforcing standards are to be reduced. Advisory safety committees and advisory consultation programs such as those provided in S. 2153 should be very helpful in this regard.

Finally, there should be incentives for employers to make necessary changes to improve worker health and safety on their own.

With fewer than 1,000 inspectors to monitor over 4 million workplaces, it would seem clear that voluntary compliance is essential to accomplishing the basic goal of the 1970 act. Yet, present law offers no such incentives. S. 2153 provides that employers who have good safety records will be exempt from routine inspections and may, under certain circumstances, be eligible for reductions of exemptions from penalties provided in the original act.

Serious reform of the Occupational Safety and Health Act is needed. S. 2153 is not an attempt to "gut" the provisions of that act, but an attempt to make them work more effectively. I believe it would be in the best interest of employees and employers for all parties to adopt a constructive approach toward solution of the critically important problems which this legislation addresses, so that an effective bill may soon be reported to the full Senate.

Mr. Chairman, as I stated earlier, yesterday I introduced a new draft of a bill which I first introduced at the beginning of the 95th Congress, and again at the start of the 96th Congress. That original bill, S. 251, is currently pending in your committee.

In reintroducing this legislation, I was pleased to have as original cosponsors three distinguished colleagues, Senators DeConcini, Domenici, and Jepsen, who have been key supporters of this type of legislation. The leadership efforts of Senators DeConcini and Domenici contributed significantly to the passage of a related bill, S. 265, the Equal Access to Justice Act, in the 96th Congress. Senator Jepsen has also had a long-standing interest in attorney fees legislation, having introduced his own bill in this regard and having been instrumental in securing the inclusion of an attorney fees provision in the Federal Trade Commission authorization bill, which is currently in conference with the House.

The new bill which I submitted amends the Occupational Safety and Health Act by adding a new subsection to both section 10 and section 11 of that act, to provide that certain employers who successfully contest citations or penalties under OSHA will be awarded a reasonable attorneys fee and other reasonable litigation costs.

This concept is embodied in a very similar bill, the Equal Access to Justice Act, which passed the Senate on July 31, 1979, by the very wide margin of 94 to 3. However, unlike this bill, which covers only the Occupational Safety and Health Administration, the terms of the Equal Access to Justice Act are applicable to adjudications and civil actions concerning any agency. Unfortunately, the House Judiciary Committee has shown little interest in taking action on S. 265 or similar legislation.

Several such bills are currently pending in the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice—one bill having been referred to the subcommittee approximately a year ago. Since the House has been very slow to act on S. 265, I feel it is important to push ahead with legislation such as mine, which focuses on a particular agency.

As I indicated earlier, there is precedent for handling the issue of attorney fees on an agency-by-agency basis. A provision concerning the award of attorney fees and other litigation expenses patterned after S. 265 is contained within the Senate-passed version of the FTC authorization bill. Senator DeConcini, who helped guide S. 265 through the Judiciary Committee and managed the bill on the Senate floor, made a strong statement in favor of including an attorney fees provision in the FTC bill.

In light of the overwhelming approval which my colleagues in the Senate indicated for the provisions of S. 265 and my own support for that legislation, of which I was a cosponsor, I concluded that it would be appropriate to redraft my original OSHA attorney fees bill to bring it in line with the provisions of S. 265.

There are certain limitations, which I will explain in greater detail, contained in S. 265, concerning the standard for awarding attorney fees and other costs of litigation, parties eligible for such an award, and other pertinent matters, which are not contained in the present version of my bill. Making these changes which generally limit the scope of my original bill will, I believe, significantly broaden the appeal of this legislation to my colleagues in the Senate.

The bill is intended, as was S. 265, to serve two basic purposes. The first and foremost reason for such legislation is to lessen the economic deterrent confronting small businesses and organizations who wish to challenge OSHA citations and penalties which they believe to be unreasonable or irresponsible.

It has become increasingly clear in recent years that the cost of challenging Government actions often exceeds the penalty or fine being contested. This imbalance often results in a situation in which the only reasonable alternative from an economic standpoint is to acquiesce in the regulatory agency's decision, paying the fine and taking any other required remedial action.

It is easy to understand the frustration of employers, particularly those who own small businesses, when they are faced with a penalty which they truly believe is unjust, yet they do not have a viable remedy because of financial considerations.

While obviously unfair to individual employers, this type of coerced compliance can have an adverse impact on the entire decisionmaking process of the Occupational Safety and Health Administration, or any other agency for that matter. Where employers are forced to pay penalties simply because it is economically impractical to challenge them, precedent is established on the basis of uncontested agency actions—a precedent which can then be applied to other employers subject to OSHA's jurisdiction.

The second major purpose of my legislation is to make OSHA more accountable in exercising its regulatory powers and more aware of the practical impact of its actions on small businesses and organizations. This legislation should help to assure that an employer's decision on whether to challenge a citation or penalty is based on his belief in the merits of his case, rather than on the cost of litigation. Successful challenges to unreasonable or irresponsible OSHA actions could only prove beneficial to that agency, both in carrying out its mission in keeping with the intent of Congress and in improving its image in the business community as a responsible, legally accountable regulatory agency.

As did S. 251, this legislation takes a very direct approach toward encouraging OSHA to assume a responsible position in enforcing its standards and the general duty clause. Any fees or other expenses awarded to an employer are to be paid out of funds appropriated to the Occupational Safety and Health Administration.

The bill further directs that no money shall be appropriated to OSHA for the purpose of paying such fees and expenses. Should OSHA have to pay many awards under this legislation, it will have tremendous incentive to evaluate its rules, its procedures, and its personnel. A related provision of this legislation requires the Secretary of Labor to report annually to Congress on the amount of fees and other expenses awarded during the preceding fiscal year. This report should help to provide Congress with some objective measure of whether OSHA is being unreasonable or irresponsible in citing or penalizing small employers.

A summary of some of the major changes made by this new draft of my OSHA attorney fees legislation would, I believe, be helpful to my colleagues. Perhaps the most significant difference between S. 251 and the bill which I introduced yesterday is the fact that the latter, in line with the provisions of the Equal Access to Justice Act, limits coverage to small businesses and organizations whose net worth is less than $5 million.

Although I indicated at the time I introduced S. 251 that my primary concern was the economic impact on small companies and businesses of challenging OSHA citations or penalties, awarding of attorney fees in S. 251 was not limited to small businesses. In retrospect, however, such broad coverage may not be necessary to insure that OSHA actions can be challenged by employers who feel that such decisions are unreasonable.

Unlike large companies or businesses who are able to afford their own in-house or regularly retained counsel, small businesses usually do not have the luxury of permanent counsel. A small businessman must, if he wishes to contest a citation or any assessment of penalty with any prospects of success, retain counsel and expend a considerable amount of money to fight these regulatory actions.

One example of the adverse economic impact on small businesses of challenging an OSHA citation discussed in hearings on S. 2354, the predecessor to S. 265, was that of a small businessman in New Hampshire who spent $3,000 successfully challenging a $25 OSHA fine.

My bill would respond to such situations by reducing this economic deterrent to challenging unreasonable actions by the Occupational Safety and Health Administration—a relatively small change in current law, but one that could help thousands—I repeat, thousands of small employers.

A second major change, again bringing my OSHA legislation in line with S. 265, concerns the standard governing the award of attorney fees and other litigation costs to a prevailing party. Under the provisions of my original bill, an employer would have been awarded fees and costs if the Occupational Safety and Health Review Commission vacated a citation or proposed penalty issued by the Secretary of Labor, or if a court of appeals set aside an OSHRC order affirming or modifying a citation or proposed penalty.

The legislation which I recently introduced provides that such an award of fees and costs would not be made at the Commission or court level if OSHA's position were "substantially justified" or if "special circumstances made such an award unjust." The burden of demonstrating the substantial justification of its position or special circumstances sufficient to deny an award, however, would be on the Government.

In light of the fact that the "substantial justification" language lessens the certainty of an employer receiving an award of fees and costs, it is only fair that the burden of proof be on the Secretary, who has greater access to and knowledge of relevant facts.

The language regarding the standard in the Equal Access to Justice Act was arrived at after lengthy discussion and debate in the Judiciary Committee. This standard represents, in my opinion, a reasonable, sensible compromise which encourages employers to vindicate their rights, yet should avoid having a chilling effect on OSHA's efforts to see that the law is faithfully executed.

This bill also provides, as did S. 265, that OSHRC or the court may reduce an amount to be awarded, or completely deny an award if the prevailing party has, during the course of the proceedings, engaged in conduct which unduly and unreasonably protracted the resolution of the matter in controversy.

One final change which should be noted is the limitation on the amount of fees and expenses which can be awarded under this legislation. The bill provides that no expert hired by an employer shall be compensated at a rate in excess of the highest rate of compensation for experts paid by the United States. It further states that attorney fees shall not be awarded in excess of $75 per hour unless an increase in the cost of living or some special factor justifies a higher fee.

In closing, Mr. Chairman, I would like to point out that this legislation makes a relatively small, but important, beginning toward correcting what I believe to be one of the most serious problems of our governmental system today—that of excessive regulation of both individual citizens and businesses.

For years, the Federal Government has been steadily increasing its control in almost every facet of American life. Federal laws—and many OSHA standards are good examples of this—have become increasingly complex and confusing, particularly to private citizens and small businesses who may not have the funds to hire an attorney to interpret their meaning.

I pointed out earlier the excessive costs involved often cause individuals and businesses to capitulate to unreasonable Government regulation, rather than litigate against an entity of greater financial resources and legal expertise in the area.

Through the equitable device of fee shifting, this legislation would help to reduce the economic deterrent facing citizens who wish to challenge or contest unreasonable governmental action. By so doing, it should help to curb excessive regulation and should encourage the Occupational Safety and Health Administration to take responsible positions in carrying out its statutory mandate.

I urge the distinguished members of this committee to give full and serious consideration to including this legislation as a provision of S. 2153. I believe that the overwhelming support for S. 265 when it passed the Senate last year indicates widespread sentiment in favor of such fee-shifting legislation.

A copy of my redrafted bill is attached to my statement, and I request that it be included in the hearing record following my comments. Or if it's appropriate, Mr. Chairman, I would ask unanimous consent that that be done.

Senator RANDOLPH. The additions other than your statement which you have presented will be included as a part of the printed record.

Senator THURMOND. Thank you very much, Mr. Chairman.

[The information referred to follows:]

96th CONGRESS
2d Session
S. ______

IN THE SENATE OF THE UNITED STATES

Mr. Thurmond introduced the following bill; which was read twice and referred to the Committee on ______________________

A BILL

To amend the Occupational Safety and Health Act of 1970 to assure equal protection for small businesses and to provide that certain employers who successfully contest citations or penalties under that Act will be awarded a reasonable attorneys' fees and other reasonable costs.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 10 of the Occupational Safety and Health Act of 1970 is amended by adding at the end thereof the following new subsection:

''(d) (1) Whenever the Commission conducts a hearing under subsection (c) and the citation or proposed assessment of penalty of the Secretary is vacated or modified in favor of an employer contesting the citation or proposed assessment of penalty, fees and other expenses incurred by the prevailing party in connection with the proceeding shall be awarded to such party, unless the Commission finds that the position of the Secretary as a party to the proceeding was substantially justified or that special circumstances would make an award unjust. The Commission may reduce the amount to be awarded, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. A decision of the Commission under this section shall be made a part of the record and shall include written findings and conclusions and the reasons or basis therefor.

''(2) For the purposes of this subsection and section 11 (d)--

''(A) 'fees and other expenses' includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees. The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert shall be compensated at a rate in excess of the highest rate of compensation for experts paid by the United States, and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court or Commission determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee; and

''(B) 'party' means any sole owner of an unincorporated business, or any partnership, corporation, association, or organization whose net worth was less than $5,000,000 at the time the adjudication was initiated or at the time that the civil action was filed.

''(3) (A) The Commission shall establish procedural rules for submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the Commission, an award of fees and other expenses may only be made pursuant to section 11 (d) of this Act.

''(B) A party dissatisfied with a determination by the

Commission with respect to the award of fees and other expenses may petition for leave to appeal to the court of the United States having jurisdiction to review the merits of the underlying decision of the Commission. If the court denies the petition for leave to appeal, no appeal may be taken from the denial. If the court grants a petition, it may modify the determination of the Commission only if it finds that the failure to make an award, or a calculation of the award, was an abuse of discretion.

''(4) Fees and other expenses awarded under this subsection and subsection 11 (d) shall be paid by the Secretary from any sums appropriated to the Occupational Safety and Health Administration, except that no sums shall be appropriated to the Occupational Safety and Health Administration specifically for the purpose of paying fees or expenses awarded under this section.

''(5) The Secretary shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection and subsection 11 (d). The report shall describe the number, nature, and amount of the awards, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.''.

Sec. 2. Section 11 of the Occupational Safety and Health Act of 1970 is amended by adding at the end thereof the following new subsection:

''(d) (1) In any civil action in which an order affirming or modifying a citation or proposed assessment of penalty under this Act is set aside or modified in favor of an employer contesting such order, the court shall award fees and other expenses incurred by the prevailing party in connection with the review to such party, unless the court finds that the position of the United States or the Secretary, was substantially justified or that special circumstances may make an award unjust. The court, in its discretion, may reduce an amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceeding engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. A party seeking an award of fees and other expenses shall, within 30 days of final judgment in the action, submit to the court an application which provides evidence of such party's eligibility for the award and the amount sought, including an itemized statement from attorneys and experts stating the actual time expended in representing such party and the rate at which fees were computed.

''(2) In awarding fees and other expenses under this subsection to a prevailing party who is an employer contesting the citation or proposed assessment of penalty in any action for judicial review of an order of the Commission, the court shall include in such award the fees and other expenses for services performed during the administrative proceedings unless the court finds that during such proceedings the position of the Secretary was substantially justified, or that special circumstances make an award unjust.

''(3) For purposes of this subsection, fees and other expenses may be awarded against the Secretary, as the case may be, without regard to section 2412 of title 28, United States Code, or any other provision of law.

''(4) Nothing in this subsection modifies, repeals, invalidates, or supersedes any other provision of State or Federal law which authorizes an award of such fees and other expenses to any party, other than the Secretary, who prevails in any civil action brought by or against the United States or the Secretary.''.

Sec. 3. The amendments made by this Act shall apply to any adjudication or civil action which is pending on the date of enactment of this Act, or which is commenced on or after the date of enactment of this Act.

Senator **Thurmond**. Again, Mr. Chairman, I wish to thank you and also the distinguished minority ranking member here for your consideration of this matter.

Senator **Randolph**. Thank you, Senator Thurmond.

I am very frank in my observation at the moment in telling you that the schedule I must keep today includes a visit into the State of West Virginia at a fixed time; hopefully the plane will depart at that moment.

If it's agreeable with you, Senator Thurmond, there is a witness from West Virginia who is going to testify. I want to be here at the time he presents his remarks. I would like to supply questions to you for you to respond to.

Senator **Thurmond**. I would be very pleased to answer them for the record, Mr. Chairman.

That would save your time and mine.

Senator **Randolph**. They will be in the published record.

Senator Schweiker, in saying that, I did not want to imply that you should not ask questions or comment on the statement. It was very comprehensive and presents a very strong viewpoint of the Senator from South Carolina.

Senator **Thurmond**. Thank you very much.

Senator **Randolph**. I remember that he voted against the creation of this program in 1970——

Senator **Thurmond**. That's right. I was only one of two or three who did at that time. I thought I saw then some pitfalls maybe that should have been corrected before it was enacted.

Senator **Randolph**. I do recall that the vote was 87 for the legislation and 3 against it.

Senator **Thurmond**. I think that's correct.

Senator **Randolph**. I'm not saying that made it right or wrong at the moment. Last year I voted against the deregulation of the scheduled airlines of this country. Just nine of us in the Senate did that. I think, Senator Thurmond, that we were right, and I think the events since are proving that. Many of the airlines have become forgetful of their obligation to the middle sized areas of the country, to the airports that were built with taxpayer money, not airline money. They became interested strictly in the long haul and larger revenues. They forgotten their obligations in many States of the Union.

Not all the carriers. I have expressed my views on this often. It's a matter of record. I mention it here to indicate that it doesn't mean——

Senator **Thurmond**. It comes down to the minority is right. [Laughter.]

Senator **Schweiker**. That's a good premise, Strom. I like that.

Senator **Randolph**. Well, I suppose you could say that would be true if a Republican were elected over a Democrat for President in November.

Senator **Thurmond**. Well, we can take it either way.

Senator **Randolph**. That's all right. It's good to have this colloquy in a lighter vein.

I do want to be very serious, however, when we talk about the minority, although it has no direct bearing here. I study very carefully the voting trends in America. The trend is constantly downward, as you know, and as all who study it know.

In the last congressional elections, when we were selecting Members of the U.S. Senate and the U.S. House of Representatives, only 34 percent of the eligible voters of the United States exercised the right and responsibility of our franchise to vote. In the prior congressional year 1974, the figure was 38 percent. It dropped over the 4-year period to 34 percent.

In connection with talk about the minority being right or wrong, I only make this observation: When less than 50 percent of the eligible voters of this country are participating in an election, whatever that election might be, we are seeing the shots being called, to use a trite expression, by a minority of the voters of this country.

By that I mean it is a majority of the minority that is calling the shots over the rest of the minority; because less than 50 percent of our citizens go to the polls.

Senator THURMOND. I think it's very unfortunate that our people don't turn out in larger numbers.

Senator RANDOLPH. Well, can you agree on what I just said?

Senator THURMOND. I think what you said about a majority of a minority is bound to be correct, because only a minority voted and a majority of those, of course, controlled.

Senator RANDOLPH. That's right.

Only 20 percent of those 18, 19, and 20 years old voted in the congressional election in 1978. I thought it would be different.

Senator THURMOND. I know of the distinguished Senator's interest in young people, and I'm hoping we can get more young people as well as the older people, too, to participate in public affairs and in elections and cast their votes in the election that is coming up here in November.

Senator RANDOLPH. I offered a constitutional amendment in 1942 for 18-, 19-, 20-year-old voting. There was only one State that then had voting for that age group—that was Georgia—people forget that—just one State. We made little progress. Eleven times it was reintroduced until it finally passed in 1971. Young people had the opportunity and responsibility to vote in 1972.

Senator THURMOND. I joined the Senator on that and supported that measure.

Senator RANDOLPH. You certainly did. I only mention that participation by age groups are very different in the voting pattern of the country.

Please forgive me for getting off the subject and taking up time. Perhaps I should have directed questions to our able colleague.

Senator SCHWEIKER. Thank you, Mr. Chairman.

I just have a comment or two. First I want to commend Senator Thurmond for this concept. It seems to me that when we have the regulatory problems that we do today, we really do make it difficult for small businesses to use the legal system. I think the case you point to here, of spending $3,000 in legal fees for $25 citation is rather typical to point out the problem. Not many people are going to spend $3,000 to contest a $25 fine. That's a problem with the system. Obviously, it is skewed against the little guy.

I think this concept, reflected in the bill that did pass, the Equal Access to Justice Act, is an excellent one. As you noted, it passed 94 to 3. Every member of this committee voted with you on that, Senator Thurmond. So I commend you for your effort here, and we appreciate your testimony.

Senator THURMOND. Thank you very much, sir.

Senator RANDOLPH. Thank you, sir.

I would like the record to indicte that members of the committee may want to submit written questions of the witnesses. The replies will be made part of the record.

Is that agreeable?

Senator THURMOND. Mr. Chairman, I would be very pleased to comply with any questions that any member of the committee may have. We'll do it just as promptly as we can.

Senator RANDOLPH. Senator Schweiker, I, and those interested in this subject on the committee are very grateful for your testimony.

Senator THURMOND. Again, I thank you both for your courtesy.

Senator RANDOLPH. We will now have a panel of presidents of State labor federations, AFL-CIO, in three States. Joseph Powell of West Virginia, will you come to the witness table; Mr. Charles Marciante of New Jersey; and Mr. Julian Carper of Virginia.

I would like for Richard Gallagher, will the National Association of Manufacturers, to know that I regret I cannot be here for your testimony because of the explanation I have made. I assure you that I will read your testimony carefully, and I hope that all members will do the same.

This next panel, I believe, we could call the leaders of organized labor in their respective States, particularly the AFL-CIO. I have not a parochial, but I would rather call it a personal appreciation for Joseph Powell, who represents the West Virginia AFL-CIO. I do not look upon him just as a leader of certain segments of labor, but as a respected and responsible citizen in the State of West Virginia. I think that's something we hope will be attained by all with positions of leadership in labor and management. They are not only committed to specific leadership positions, but also committed to active participation in the communities in which they live, and their States—working a broader base.

For the efforts of Mr. Powell and others, I recall what I think indicates, in part, what I'm saying. We have 13 States in what we call the Appalachian Regional Commission. West Virginia is covered as a whole State, and others, like Pennsylvania, in part.

In these States, we have witnessed the creation, through the leadership of the AFL-CIO several years ago, of the Appalachian Council. That program, has markedly improved employment and environment understanding. Their efforts are very helpful to not only management and labor, but to a State like West Virginia, as well as other States included. Greater opportunities have been presented, and greater challenges have been accepted. An interest in all workers has been demonstrated.

Mr. Powell will testify regarding safety and health in the workplaces of West Virginia. We know that despite the very considerable efforts that have been made by Senator Williams, the chairman, and members of this committee—Senator Schweiker certainly—and other Members of Congress generally, that a commendable improvement has occurred in safety and health for the working population of our country.

That which has been accomplished has encouraged us to keep on.

Even though much has been accomplished, I recall that 2 years less 10 days 51 workers died because a scaffolding collapsed on a cooling tower under construction at Willow Island, W. Va. That was a tragic accident. It serves to remind us that although progress has been made in health and safety, we must continue, regardless of our feeling about a certain bill, to work for the progress which was envisioned by those who supported the original legislation in 1970. We need to fulfill that promise.

In studying the bill before us, we will take a close look at the testimony and the presentations of arguments for change or perhaps for a continuation of the basic law that has been on the books now for 10 years.

Joseph Powell, would you be the first witness of the three witnesses on the panel? Is that agreeable with the others? I wouldn't want to have West Virginia go ahead of Virginia, of course——

Mr. **Powell**. Senator, my colleague and friend from New Jersey is on an extremely tight schedule, so if you wouldn't mind——

Senator **Randolph**. We're going to be tight together, to use that expression, partially caused by me and my talking.

I hadn't known of your schedule, Mr. Marciante, until this minute. How long is your statement?

Mr. **Marciante**. I can do it in about 7 minutes.

Senator **Randolph**. Well, I think that's a lucky seven. So go ahead, Mr. Marciante.

STATEMENT OF CHARLES H. MARCIANTE, PRESIDENT, NEW JERSEY STATE AFL-CIO; JOSEPH W. POWELL, PRESIDENT, WEST VIRGINIA LABOR FEDERATION, AFL-CIO; AND JULIAN F. CARPER, PRESIDENT, VIRGINIA STATE AFL-CIO, A PANEL

Mr. **Marciante**. Thank you very much, Senator.

It is a pleasure for me to be able to express the point of view of our organization on an issue of such vital importance to the trade union movement. The New Jersey State AFL-CIO and its affiliated unions throughout the State join with all of organized labor in adamently opposing the proposed revisions to the Occupational Safety and Health Act as outlined in Senate bill 2153.

If adopted, these amendments will assuredly exempt nearly 90 percent of American businesses from periodic safety inspections, will drastically reduce the effectiveness and regulatory powers of OSHA, and once again force workers to be dependent upon the whims and good nature of their employers for decent working conditions.

We played a role in the late 1960's with the chairman of this committee in putting together testimony and statistics which ultimately resulted in the creation of the Occupational Safety and Health Act, and we are proud to say that I played a roll in the formation of those statistics and providing them to our Senator, the chairman of this committee.

Perhaps no legislation introduced in the last decade represents such a threat to American workers—I'm referring to S. 2153. The Occupational Safety and Health Act has proven to be more than just an effective means of reducing health and safety hazards in the workplace. It has irrevocably evolved into a symbol for the worker. In essence, it is the Magna Carta of the American worker.

OSHA represents tangible evidence that the worker has a degree of control over his own destiny, that he can directly affect and regulate the safety of his workplace and for those who work with chemicals and chemical materials, improve the long-range potential of their health.

Make no mistake about it. OSHA is an important psychological, physical, and social advancement for the American worker, one that members of this committee must not take lightly. And make no mistake about it, Senate bill 2153 will surely eliminate or emasculate many of the most important provisions of OSHA.

Organized labor is concerned that the legislative proposal makes several assumptions that are simply not valid—primarily the one that presumes that employers have now ascended to a new strata of social consciousness in which they will voluntarily assume an active responsibility to provide decent, safe working conditions. We only wish it were true.

But, considering past performance, labor is not yet prepared to blindly cloak members of the business community in such a mantle of philanthropic largess. Such reasoning would totally ignore the conditions which led in 1970 to the creation of OSHA in the first place.

The threats posed by these amendments are numerous and obvious: First, they would exempt nearly 90 percent of the American businesses, employing an estimated 43 million workers, from inspections. In New Jersey alone, where there were a reported 203 work-related deaths last year, these new amendments would exempt more than 125,000 previously covered firms. Without general spot checks, it's highly likely that employers will lose their incentive to take preventive action against hazardous conditions. And, to avoid a statistical reporting of accidents that could result in future inspections. It would be advantageous to employers to pressure injured workers to remain on the job which we know is the case in too many plants and jobsites in New Jersey.

We are also appalled by the proposed revision of the law that would refer a worker's complaint about safety back to the employer to be remedied and would require advance notice to the employer before plant inspections could take place. Not only could this result in unwarranted job pressures against the concerned worker, but it could enable an unscrupulous employer to only temporarily eliminate safety hazards until after the inspection.

As drafted, the proposed OSHA revisions would result in a meaningless after-the-fact law. By limiting inspections primarily to those establishments which experienced a work-related death or sizable number of accidents resulting in hospitalization, you would be severely restricting the ability of Government to alleviate hazards and prevent accidents before they occur.

The proposed legislation would also limit OSHA's ability to uncover and expose potential carcinogenic dangers that might not

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affect a worker until 20 or 30 years down the road. New Jersey is the chemical capital of the world, if not, certainly the United States. We have many instances of asbestosis in the State of New Jersey. In the majority of the cases, none of the symptoms or the pain that has resulted from asbestosis arose until 20 or 30 years after the exposure, or continued exposure.

We also have a chemical industry that is constantly inventing new formulas, whose dangers we do not know. One of the most recent, of course, was the PCB, which resulted in liver cancer.

We are greatly concerned that an increased reliance on State-compiled accident and safety statistics for the purposes of inspection would be grossly inadequate, since such statistics are notoriously inaccurate. The OSHA program must continue to utilize actual work and risk hazards on the scene as the truest barometer of potential danger.

Labor also views with alarm the very real possibility that a preliminary decrease in safety inspection regulations, as outlined in S. 2153, would only be the first step in an anti-OSHA campaign which would eventually eliminate health inspections also and ultimately gut the entire program.

If the OSHA program is to be changed, it must be changed for the better. It must be made to protect more workers, not less. It doesn't make sense to destroy a basically effective work safety program simply because it has a few admitted shortcomings. Eliminate the shortcomings, not the benefits.

If OSHA's 965 safety inspectors cannot adequately investigate the 4.4 million workplaces under their jurisdiction, then increase the number of inspectors; don't decrease the number of establishments to be inspected.

OSHA has been successful to date. The on-the-job fatality rate declined between 1972 and 1978, and the rate of all injuries dropped from 10.6 per 100 workers in 1973 to 9.2 per 100 in 1978. In addition, it is estimated there were nearly 4 million fewer injuries between 1973 and 1978 than would have occurred had the 1973 rate remained constant during that period.

The program has been successful. It can be made even more effective, but only through better implementation of existing regulations. It will never happen if this committee votes to reduce or eliminate existing health and safety standards.

Thank you very much, Senator, and Senator Schweiker.

Senator **Randolph**. Thank you very much for your testimony, Mr. Marciante. You have stressed the importance of New Jersey as the center of the chemical industry, is that correct?

Mr. **Marciante**. That's correct.

Senator **Randolph**. Is that concentrated in the Newark area or is it spread throughout the State?

Mr. **Marciante**. It's pretty much widespread. It's primarily in the northern and central part of the State, and in the very southern part of the State there's a concentration there as well.

Senator **Randolph**. Would you repeat once more how many workers are in the chemical industry, approximately, in New Jersey?

Mr. Marciante. I believe in the neighborhood of 54,000 to 58,000 are directly employed by the chemical industry in the State of New Jersey.

Senator Randolph. Would you once again for the record say why you believe the measure sponsored by our good friend and able colleague, Senator Schweiker, would weaken the program that has been in effect for 10 years under the present law?

Mr. Marciante. As I read the legislation, Senator, the provision that there either be a death or a continuous or rather substantial number of injuries, before OSHA would be permitted to go into a plant, we believe that to be absolutely a wrong position to take. We feel that a spot check of industries throughout the State sort of keeps everyone on their toes.

In the chemical industry, the various forms of new types of chemicals that are invented to do various things industrially, we don't know what some of their effects are. Sometimes their effects would not be shown for 10, 15, or 20 years, as we have witnessed with asbestosis, where it takes 20 to 30 years in some instances. We don't know what these new chemical effects are going to be.

The idea of the degree of pollution would not be checked unless there were deaths or accidents resulting therefrom. And since we have such a high degree of workers in the chemical industry in our State, we are here testifying to that effect and would like to see this particular bill put aside.

Senator Randolph. Aside from this particular subject, but akin to it, Mr. Marciante, you know that from the committee which I chair, environment and public works, came the Clean Air Act. Do you believe that legislation has helped in the State of New Jersey to purify the air and make it better for not only the workers but the communities as well in the State?

Mr. Marciante. Yes, sir, I do, although I don't feel that it is equally enforced. I think that our State has some of the most stringent standards in the Nation, and in other States the enforcement of those standards aren't as strong as they should be.

Unfortunately, we are on the downside of the prevailing wind and we are the recipient, the unfortunate recipient, of a lot of industrial wastes from a number of other States as a result of being downwind.

Senator Randolph. I can understand that. We are addressing that problem now in hearings on what is called acid rain, in connection, with greater use of coal to replace natural gas and petroleum in utility boilers and at other industrial installations.

Senator Schweiker?

Senator Schweiker. Thank you, Mr. Chairman.

I really don't have a question, but I just want to keep the record straight.

I agree with the gentleman's testimony about asbestosis and the health problems. I think they're very serious problems. Of course, that's why I specifically didn't include health hazards in my bill. In fact, we say "nothing in this subsection shall limit the authority and responsibility of the Secretary to take all actions authorized by this act with respect to occupational health hazards." I think, as he said, you can't tell health hazards until 20 or 30 years later, and the bill doesn't attempt to do that.

It is possible under my bill to have an unannounced inspection under two separate sections. If there's an imminent danger or other hazard that is so serious in nature that it warrants expeditious attention, the Secretary under section 4(a)(1)(B) can go in on an unannounced basis; or, if it's a hazard that can't be effectively identified by reference to occupational injury rates, they also can go in on unannounced inspections.

I just wanted to set the record straight on that.

Senator **Randolph**. Thank you, Senator Schweiker.

Mr. Marciante, we will give you the opportunity, as we do to all witnesses, to add additional material that you feel is of value in connection with your statement.

Mr. **Marciante**. I would be happy to do that, sir.

Senator **Randolph**. Joseph Powell of West Virginia, would you testify now, sir.

Mr. **Powell**. Senator Randolph, thank you very much for the opportunity to appear here, and may I express our appreciation to you and also to Senator Schweiker for the support we have had in the programs that the labor movement has in the Appalachian Council area.

Since President Marciante has covered many of the things that I had expected to speak about, I would like to limit myself to three different items: One, reporting procedures; two, the Willow Island disaster and some lessons from that; and three, the safety inspection situation.

I would like to say the West Virginia AFL-CIO works with its total membership in representing them before the workmen's compensation commission of the State of West Virginia in any workers' compensation claims they might have. In the many years that we have represented the workers in this fashion, we find that it is not unusual for the company to try to bypass the workmen's compensation laws that we now have by asking their employees to go on the insurance program and sit on a chair, if it's a major injury, rather than file for workers' compensation. The main reason for this, of course, is once a workers' compensation claim is filed, and if it's a progressive-type situation and becomes worse, the worker then has recourse to return and reopen his case.

Unfortunately, this is a prevalent method of doing business. We think that Senate bill 2153 would only increase this type of arrangement, since there obviously would be a great reward for not reporting workmen's compensation claims. This is injurious in two ways—one, to the worker himself, by not having his claim on record, and two, of course, the safety of the workplace.

The second item, the Willow Island disaster, in which 51 workers fell to their death just less than 2 years ago, as you indicated, I would indicate to you that if those workers had been covered, under the State law that was in effect previous to 1970, the total extent of the liability of the company would have been somewhere between $250 and $500. As it was, the companies were fined over $100,000. We think this is by far too little, but it indicates the great disparity in what we had before 1970 and what we have now. In addition to that——

Senator **Randolph**. You're speaking of a State law?

Mr. **Powell**. The State law previous to 1970.

In addition to that, under Senate bill 2153, the Willow Island construction effort would have been a safe plant and therefore not subject to unannounced investigations. We think this indicates the tremendous fallacy that is advanced by this bill.

The last item that we want to go into is the fact that—and it was mentioned before but we think it's worth repeating—that under the "safe" classification the safety situation, where they could not then investigate a violation that they ran into by accident, would hurt workers particularly in the chemical industry, Senator, as you are aware, West Virginia has a chemical valley of its own, and just last week we witnessed an episode where at a small plant water seeped into a sodium deposit and brought about a chemical reaction which brought on the evacuation of several schools in the neighborhood in Nitro, W. V.

It must be stated that the owner of that firm resisted until Tuesday of this week allowing the OSHA inspectors into that property. On Tuesday of this week he indicated that he would allow them to inspect the institution.

Therefore, we feel that Senate bill 2153 is a direct attack upon the lives of workers and, more particularly, on the physical being of those workers who are under terrible circumstances in regards to the safety of life and limb.

Thank you very much.

[The prepared statement of Mr. Powell follows:]

TESTIMONY
Of
Joseph W. Powell, President
West Virginia Labor Federation, AFL-CIO
Before the U.S. Senate Committee on Labor
and Human Resources
Regarding Pending OSHA Legislation
April 17, 1980

Mr. Chairman: My name is Joseph W. Powell. I am President of the West Virginia Labor Federation, AFL-CIO. I am here today to convey our comments on pending legislation regarding the Occupational Safety and Health Administration.

The Federal Occupational Safety and Health Administration (OSHA) has been described as the most despised agency in Washington. Since its creation ten years ago, it has been assailed by critics on all sides. Both labor and industry have been critical. OSHA was even intentionally made an escape goat by an administration who wanted to sabotage it. However, Secretary Bingham in three years has transformed this agency and it has survived the challenges to its continued existence.

Now, however, OSHA faces its most serious challenge in the form of Bill S.2153. The supporters of this legislation claim their goal is to protect the agency from its many critics in the Congress, but the Schweiker Bill is a response to the "folklore" of the act not its substance. The Bill is unnecessary, and the West Virginia AFL-CIO feels that the surgery may kill the patient.

OSHA may have deserved some of the criticism which was heaped on it during its early years when the agency concentrated its efforts on enforcing a ridiculous assortment of obscure rules - such as regulating the shape of toilet seats and the presence of ice in drinking water - and largely ignoring far more critical problems such as hazardous chemicals in the Kanawha Valley of West Virginia or dangerous worksites such as Willow Island, West Virginia.

BUT CHANGES HAVE BEEN MADE - CHANGES WHICH HAVE ALLOWED THE AGENCY TO COME CLOSER TO ITS CONGRESSIONAL MANDATE OF "ENSURING WORKPLACES THAT ARE FREE FROM RECOGNIZED HAZARDS." FOR EXAMPLE, OSHA CITATIONS FOR SERIOUS VIOLATIONS OF SAFETY AND HEALTH REGULATIONS, ROSE OVER SIXTY PERCENT BETWEEN 1977-1979 AND LAST YEAR OSHA FINES TOTALED OVER $20 MILLION COMPARED TO $11.6 MILLION IN 1977.

THE SCHWEIKER BILL IS OFFICIALLY KNOWN AS THE OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980 - A CHARACTERIZATION OPEN TO QUESTION. IF ENACTED, THE LEGISLATION WOULD EXEMPT 90 PERCENT OF THE WORKPLACES IN THE UNITED STATES FROM OSHA PROTECTION. BUSINESSES REPORTING LESS THAN TWO LOST WORKDAYS DUE TO INJURIES FOR EVERY 100 FULLTIME EMPLOYEES EACH YEAR WOULD BE CLASSIFIED AS "SAFE" WORKPLACES. ONCE A WORKPLACE WAS THUS CATEGORIZED, OSHA COULD NO LONGER CONDUCT UNANNOUNCED SAFETY INSPECTIONS, EVEN IN RESPONSE TO A WORKER COMPLAINT. INSTEAD, THE AGENTS WOULD BE REQUIRED TO CALL THE EMPLOYER TO ASCERTAIN IF THE PROBLEM HAD BEEN REMEDIED.

UNDER THE BILL, THE "SAFE" CLASSIFICATION WOULD BE BASED ON STATISTICS COLLECTED FOR THE ENTIRE WORKPLACE, MEANING THAT INJURIES OCCURING IN HAZARDOUS OPERATIONS, SUCH AS FOUNDRIES OR STAMPLING PLANTS, WOULD BE AVERAGED IN WITH SAFER OFFICE AND MANAGEMENT ASSIGNMENTS. WE MAINTAIN THAT EMPLOYERS WOULD FALSELY REPORT INJURY DATA UNDER THE PROPOSED CHANGES TO KEEP FROM BEING INSPECTED.

THE SCHWEIKER BILL (S.2153) IS THE MOST DANGEROUS THREAT TO OSHA SINCE ITS INCEPTION. THE SPONSORS OF THE BILL CLAIM THAT THEY BACK THIS BILL BECAUSE THEY FEAR SOMETHING EVEN WORSE. IT SEEMS CLEAR; HOWEVER, THAT THE SPONSORS ARE NOT FULLY AWARE OF THE IMPLICATIONS OF THE BILL:

--EXEMPTING 90% OF ALL WORKPLACES FROM INSPECTION WOULD CRIPPLE THE PREVENTIVE NATURE OF OSHA ENFORCEMENT AUTHORITY;

--RELEGATING OSHA TO AN "AFTER-THE-INJURY" ROLE IN THE INSPECTION OF WORKPLACE SAFETY PROBLEMS;

--RENDERING IMPOTENT A WORKERS RIGHT TO REQUEST A SURPRISE INSPECTION, AND THEREBY EFFECTIVELY DEPRIVING WORKERS OF RIGHTS GUARANTEED BY THE OSHA ACT TO ALL WORKERS;

--INVITING EMPLOYERS TO UNDER-REPORT INJURIES AND TO KEEP INJURED WORKERS ON THE JOB. THE BILL'S DEFINITION OF "SAFE WORKPLACE" (TWO OR FEWER LOST WORKDAY INJURIES AND NO DEATHS) STILL LEAVES A VERY HAZARDOUS WORKPLACE.

ONE ADDITIONAL CONCERN WHICH MUST BE VOICED IS THAT THE BILL EXCLUDES OSHA FROM LOOKING AT OTHER PROBLEMS IN A PLANT BEYOND THE ORIGINAL ITEM OF COMPLAINT. THIS HAS SERIOUS RAMIFICATIONS. WHILE THE SCHWEIKER BILL APPLIES ONLY TO SAFETY INSPECTION, THE FACT THAT MANY HEALTH OR HYGIENE PROBLEMS ARE DISCOVERED BY OSHA COMPLIANCE OFFICERS WHILE ON SAFETY INSPECTION WILL LEAD TO LESS DISCOVERY AND ENFORCEMENT OF HEALTH STANDARDS. THIS IS ESPECIALLY TRUE OF INDUSTRIES SUCH AS RELATIVELY SMALL LUMBER, GAS AND OIL AND CHEMICAL OPERATIONS IN WEST VIRGINIA'S KANAWHA AND OHIO VALLEYS. IT HAS BEEN CALCULATED THAT IF ALL BUSINESSES (SMALL AND LARGE), EXCLUDING THOSE EXEMPTED UNDER THE LAW, WERE INSPECTED IN THE INDUSTRIAL VALLEYS OF WEST VIRGINIA IT WOULD TAKE NEARLY 100 YEARS WITH THE CURRENT STAFF.

OSHA could certainly use an "Improvements Act," but not one like S.2153. The West Virginia Governor's Willow Island Commission recently indicated that West Virginia's OSHA Office needed three times the current staffing level if it is to adequately enforce the law. Achievement of adequate staffing is a needed improvement. "Right to know" regulations that protect workers from working with unknown hazards is a needed improvement. Secretary Bingham has just announced the implementation of these regulations. A regulartory process that would set standards for more than 45,000 chemicals in common industrial use (OSHA has less than 500 chemicals standards) is a needed improvement.

Real improvements in the OSHA program - yeas; a dramatic retreat from the commitment spelled out in the landmark OSHA Act of 1970 as represented in S.2153 - no.

Specifically, S.2153:

—Exempts 90 percent of all work places, regardless of size, from most safety inspection by the Occupational Safety and Health Administration;

--Takes away the statutory right to an O.S.H.A. safety inspection in response to valid, formal complaints;

--Prohibits most comprehensive inspections and severely limits the scope of any O.S.H.A. inspections;

--Provides that most work places could be inspected for safety violations only after a worker has been killed or seriously injured;

--Attacks the effectiveness of our safety committees by reducing or eliminating O.S.H.A. penalties where

THEY EXIST, THEREBY DEPRIVING THE COMMITTEE OF ITS MOST EFFECTIVE WEAPONS;

--ALLOWS CERTAIN WORK PLACES TO BE SUBDIVIDED INTO MULTIPLE WORK SITES FOR DETERMINING EXEMPTION FROM SAFETY INSPECTIONS. O.S.H.A. COULD THEN INSPECT ONE AREA OF THE PLANT, BUT NOT ANOTHER;

--ELIMINATES ALL FINES FOR SAFETY VIOLATIONS IN PLANTS WITH 10 OR FEWER WORKERS;

--CHANGES THE EFFECTIVE DEFINITION OF AN OCCUPATIONAL INJURY FROM AN INJURY REQUIRING MORE THAN FIRST AID TREATMENT TO AN INJURY RESULTING IN AT LEAST ONE LOST WORKDAY.

THIS IS ONLY PART OF WHAT S.2153 WOULD DO TO O.S.H.A. AND TO WORKERS.

WE, THE WEST VIRGINIA AFL-CIO, FEEL PARTICULAR SHOCK ABOUT LEGISLATION WHICH, IN ANY WAY, SERIOUSLY EFFECTS THE OSHA INITIATIVES IN BEHALF OF WORKERS. THIS CONCERN IS UNDERSCORED BY THE SADNESS OF THE APRIL 27, 1978 WILLOW ISLAND, WEST VIRGINIA SCAFFOLD FALL WHICH RESULTED IN THE DEATHS OF FIFTY-ONE OF OUR BROTHERS. THAT MEMORY STILL LINGERS AND IS A CONSTANT REMINDER TO US IN WEST VIRGINIA AS TO WHAT COULD HAVE BEEN AVOIDED WITH THE PROPER SAFEGUARDS TO THE FACTORS CONTRIBUTING TO THIS DISASTER.

RECENTLY A SPOKESMAN FOR SEN. SCHWEIKER SAID S.2153 WAS INTENDED TO "KEEP OSHA ALIVE." IN THE EFFORT TO KEEP OSHA ALIVE, THE CONGRESS SHOULD NOT LOSE SIGHT OF THE GOAL OF ALSO KEEPING THE WORKER ALIVE.

THANK-YOU.

Senator RANDOLPH. Mr. Powell, let's go back to Willow Island and have you supplement, if you would. You stated that had such and such—I'm not trying to use your exact words—been done, that the situation would not have developed.

Could you fill that in for the record?

Mr. POWELL. Well, I did not mean the accident. I am saying that under Senate bill 2153 there would have been no inspection at that plant because it would have been considered a safe operation under the proposed bill.

Senator RANDOLPH. Then you're saying, in effect, that the bill pending before this committee, if it became law, would have put the stamp of approval, let's say, on Willow Island?

Mr. POWELL. It would have been considered a safe construction project and, as such, would not have been subject to inspection.

Senator RANDOLPH. And you would say it was not safe, is that correct?

Mr. POWELL. That's correct.

Senator RANDOLPH. Is there documentation you might add for the record?

Mr. POWELL. Senator, I was a member of the Willow Island Commission which investigated the circumstances surrounding that tragedy. It's a little difficult to make statements, particularly since there are some civil suits in court——

Senator RANDOLPH. I understand.

Mr. POWELL [continuing]. But it's rather obvious that there were at least three very important aspects that came together at that particular time that caused that disaster. That is taken from the citations and, of course, is the feeling of the commission.

Senator RANDOLPH. Mr. Powell, we have had considerable discussion in the matter of penalties. The bill of Senator Schweiker and others would provide for the elimination of penalties for other than willful or repeat violations in certain circumstances, and would in other circumstances establish a cap, a ceiling, on civil penalties.

OSHA proposed penalties that totaled $108,300. Is that figure correct?

Mr. POWELL. Right, over $100,000.

Senator RANDOLPH. Do you feel perhaps it should have been more?

Mr. POWELL. We feel it should have been more, yes.

Senator RANDOLPH. Then you feel that OSHA penalties, have been an effective inducement for compliance with safety standards.

You were very close to that project, to the tragedy. Are there any other comments you would like to make?

Mr. POWELL. The reason we felt that was a very light fine, Senator, is in view of the fact that the project was somewhere between—$500 and $750 million—that $100,000 worth of fines would not even be a tenth of a percentage point of the overall profit that would be made by a company building such a site. So we do not feel that was near enough, although, of course, it was the limit that the Department of Labor could impose.

Senator RANDOLPH. What's the situation now at Willow Island?

Mr. POWELL. The facility is now under construction, or will be. They have changed several procedures, incidentally.

Senator **Randolph**. Mr. Powell, you also mentioned the plant at Nitro, W. Va., close to Charleston, our capital. Would you for the record, if you feel it's appropriate, name the plant in question?

Mr. **Powell**. Well, I could name the individual that owns it, but I don't think that's necessary.

I can say this. He has been the most vocal opponent of the OSHA regulations in West Virginia, with a constant barrage of letters to the editor concerning the problems that OSHA has imposed upon that plant. It's rather obvious, especially from that incident, that OSHA should even be more involved in the inspection of that particular facility.

Senator **Randolph**. Thank you very much, Mr. Powell, for coming today. You are conscious, of course, of the commitment that Senator Schweiker, the principal sponsor of this legislation, has made to the overall interest in health and safety of workers. I think he has an excellent record on matters of concern to those who are a part of the labor force of this country. I say that just myself and you don't need to comment one way or the other.

I cannot, however, support his legislation. This is not the place for me to set forth my own views and reasons. That will be done at a later time. I do want to show my appreciation for his attention to these matters.

I will not be able to hear Mr. Carper from Virginia. I will ask that you give your testimony. Please start, if you would, Senator Schweiker is coming in. Please understand my having to leave.

Mr. **Carper**. Thank you, Senator Randolph.

Mr. Chairman and members of the Senate Committee on Labor and Human Resources, my name is Julian Carper. I am president of the Virginia State AFL–CIO. I deeply appreciate the opportunity to appear before this distinguished committee.

I have submitted advance copies of my written testimony which outlines in some detail our reasons for being opposed to the Schweiker amendment.

We strongly feel that what is needed is effective enforcement of OSHA and not a relaxation or dismantling of its provisions.

I recognize the amount of time to be allocated to each witness is somewhat limited. I would like to take the limited time that I have been allotted to introduce a few persons from Virginia who can give the committee some fundamental and very basic reasons why we feel that effective enforcement is needed, not an alteration of the act.

The first person I had wanted to introduce to the committee was brother John Quackenbush, a member of our State executive board and the secretary-treasurer of the Washington Building and Construction Trades Council. John is very concerned with the problem that exists in the construction industry and the high percentage of accidents and deaths that are even still occurring. But John had to leave for a 1 o'clock appointment in Winchester, Va.

However, he was kind enough to arrange to get several witnesses to come and to appear before the committee.

I might say, before I introduce those witnesses, that I think, generally speaking, our safety problems, accidents, or even deaths on the job, are somewhat statistics until they really touch the family circle. Then it becomes once and for all the true value and meaning of human life.

I think that one of the most important things that any or all of us cherish is life itself. I think we will go to any extent to try and defend and protect it. That is the purpose of our presence here this morning.

The first person that I would like to introduce is Mrs. Judy DeGroot, who happens to be the mother of a son who lost his life in a trench, a tragedy over in Fairfax County.

Mrs. DEGROOT. I was kind of unprepared because I didn't realize there was a meeting until yesterday morning. But I would just like to tell you a little bit about the frustrations that I have received since the death of my son.

He was killed 2 years ago in a trench, he and his fiance's brother were buried alive. The frustration at that time is that I wondered, you know, who do we blame and who do we talk to, who helps us now, and how do we prevent this from happening again.

I found out at the time of my son's death there was a local inspector on the job. But in the State of Virginia, a local inspector cannot stop unsafe jobs—only OSHA.

I went to the Commonwealth's attorney of Virginia and I said, "Will you prosecute?" He said, "Well, this isn't willful." I asked the Fairfax County Board of Supervisors if they could help. They tried. They tried to pass a resolution that local inspectors could stop jobs, which would give us many people to be out on the line of construction work. The attorney general of Virginia said that was illegal.

Finally the Federal Government, OSHA, came into it. They did fine the corporation $12,000, which is now under appeal. The company was charged with gross willful negligence, which is under appeal.

I don't know where you turn if you can't turn to OSHA in this country. That's about all I really have to say.

Senator SCHWEIKER [presiding]. What was the problem that OSHA didn't prevent this from happening?

Mrs. DEGROOT. OSHA only had three inspectors for all of northern Virginia. That is why.

Senator SCHWEIKER. What kind of a job site was this?

Mrs. DEGROOT. This was a large construction job, a housing development.

Senator SCHWEIKER. You see, one of the things about my bill is that it would target inspections to high-hazard workplaces where most of the hazards are. One of the things I'm trying to do is eliminate inspections that turn up no serious hazards, which is now two out of three inspections, and have inspectors go where serious injuries are likely. Of course, construction is one of the high-hazard industries, so that would be targeted.

Well, I think you have very dramatic and very important testimony. That's the kind of thing that OSHA should be responsive to. It disturbs me that in the last 2 years our fatality rate has increased. I don't know if you have seen those figures.

Mrs. DEGROOT. Yes; I have.

Senator SCHWEIKER. The fatality rate has actually increased in the last 2 years.

I totally concur. I think this is where the emphasis has to be, where we've got to be tough and where we have to put the emphasis. We very much appreciate your testimony.

Mrs. DeGroot. Senator, may I ask you this. If we could hire enough OSHA inspectors to be at the job sites, the workmen's compensation law still makes it cheaper to kill a workman in this country—at least in the State of Virginia—than it does to shore a job. My son's life was worth $1,000 in workmen's compensation, which was less than it would have been to shore the trench in which he was killed. I still don't quite understand how we can prevent these deaths.

Senator Schweiker. I would certainly concur that some of our compensation laws in the States are nowhere equitable.

Mrs. DeGroot. Thank you very much.

Senator Schweiker. Thank you very much for being here.

Mr. Carper. The next person I would like to introduce is Mr. Harry Coates. He is a member of the elevator constructors and was involved in the Bailey's Crossroads incident when the towers collapsed.

Mr. Coates. Good morning, Senator.

I happen to think that the OSHA program is a very fine program, that needs a lot more latitude. It's very understaffed.

I personally was involved in the Skyline collapse, which was absolutely inexcusable. One of our men was killed instantly, and a man who happened to be helping me that morning is today a semi-invalid. I believe almost 12 or 13 other men were killed on that job, and at least 38 injured. It was a direct result, I think, of a lack of supervision and of very poor judgment on the part of the concrete superintendent.

This entire thing could have been avoided because I am sure they didn't take into consideration that the concrete in question was poured perhaps, to my knowledge, during subfreezing weather, stripped on a Friday afternoon when it was very, very unseasonably warm, and the stripping operation could have been delayed until Monday morning and none of this tragedy would have occurred.

Senator Schweiker. One of the peculiarities of the State dealing with the problem you describe is Virginia has a State plan.

My question to either of you is, What might OSHA do to see that the State plan is performing better?

Mr. Carper. Senator Schweiker, I might respond to that.

We are petitioning the U.S. Department of Labor that the Federal OSHA take over the enforcement of the act, because we have opposed the Virginia OSHA plan from its very inception, because it was very evident from the very beginning that the purpose of the Virginia OSHA plan was to try to not measure up to the "as effective as" provisions of the Federal act. This I think is our total point.

We have seen what happens when you relax the provisions, when you make it more difficult to enforce the penalties. We have seen where people have been killed in trenches and there have been fines of only $400 placed against employers.

So in response to your question, we are petitioning, along with a number of international unions, that the Federal OSHA take over the program.

Senator SCHWEIKER. How long, Mr. Carper, have you been petitioning, to have OSHA, in essence, take over?

Mr. CARPER. We filed our petition during this past year, and we have been opposed to the Virginia plan from its very inception. We opposed it during the general assembly. I appeared before every subcommittee that was considering the OSHA plan. We have been on study committees. We have voiced our opposition. We have refused to even support any kind of alterations to the more recent Virginia plan because we feel the whole thing is completely inadequate and was designed not to be as effective.

I believe you mentioned earlier, Senator, there have been a number of deaths, and I think one of the reasons for the deaths is the fact that there has not been the necessary appropriations from the Congress of the United States to provide the necessary inspectors under the Federal OSHA in order to make sure the intent of the act is carried out and that a full measure of health and safety is provided.

We are interested in health and safety and not necessarily interested in citations and fines. But if you remove those penalties, in our judgment there is not going to be any incentive for a person to clear up the unsafe conditions. If there's only a slap on the wrist when a serious violation is found, and you go back a year later—you only have enough inspectors to go around a year later—that condition still exists.

Unless there is some severe penalty on the part of the employer, there is going to be no incentive for him to correct this problem. This is one of the major concerns that we have.

Senator SCHWEIKER. You're absolutely right about the inspection force. There are 4.3 million workplaces in this country and we have only 1,000 OSHA inspectors. Even if they worked day and night, they can't cover more than 2 percent of these places. This is one of the things my bill tries to alleviate. If OSHA can only cover 2 percent, they should concentrate their efforts where the likely hazards are, such as in construction. But let me follow up on this State plan for a minute, because I think you have a valid point.

When do you expect to hear from OSHA and what answer have you gotten back from OSHA about implementing a Federal plan?

Mr. CARPER. It's under consideration now.

Senator SCHWEIKER. How long has it been under consideration?

Mr. CARPER. I believe—I appeared before a group here in Washington in early December, I believe.

Senator SCHWEIKER. Do you have any idea when you will get a specific answer from OSHA?

Mr. CARPER. I have not gotten any specific information on when they might—I think there are certain provisions, Senator, under the act, that the process they have to go through to make that determination, the hearing process. I think this is the status of it at the present time.

Senator SCHWEIKER. Do you have any other witnesses?

Thank you very much, Mr. Coates.

Mr. **Carper**. The next witness that I have is Mrs. Baker, who is also the mother of a son who lost his life in one of the trenches in Fairfax, Va.

Mrs. **Baker**. Thank you, Senator, for taking the time to listen.

I have a great deal of frustration that I am dealing with, simply because from the time my son was killed to the present time I have never been able to get anyone in the State to take any constructive action as a result of this accident.

I have gone to members of the assembly; I have gone to the Governor; I have gone to the Commonwealth's attorney; I have gone to the bureau of licenses. I have a great long list of people. All I got from all of them was the same response. They were very understanding, but they kept telling me there was nothing they could do because of the way the Virginia State laws are written. They are written to protect the employers and are not written to protect the workers.

In all cases, they could not prosecute. We tried to get some legislation through the assembly and the assembly members simply are not interested in anything that they feel is going to impact adversely on the construction industry. They will not touch it with a 10-foot pole.

I don't believe that the State of Virginia is interested in the safety of the workers. I think they are interested in the monetary benefits to be gained from the expansion that the construction companies bring to the State. I don't believe they will ever enforce this law the way it should be enforced.

The only response I have gotten, the only work that has actually been done, any forward motion on this at all, has been through the Federal authorities. They have been very cooperative; they have stayed on top of it; they have worked through the process and are still doing so.

I think the individual people still very badly need the Federal OSHA.

The only other point I wanted to make here is that I have a great deal of concern about your limiting of the inspection authorities. The reason I have concern is that I talked after the accident with a number of workers and heard horror story after horror story of accidents and things that are happening every day and are never reported. I know that that continues to happen. They don't report it because they don't want to lose their jobs. They can't afford to. And they will not give you an affidavit for the same reasons.

But it's happening. Those people are out there. They are being subjected to this. They have no say in it and they have no protection.

By the same token, if they are killed, as my son was—he was covered by the workmen's compensation laws. We have no choice in that and neither did he. That coverage is compulsory, as you all know. But that coverage also precludes any actions against the employer no matter how guilty he may be. You can take no action because of the worker's compensation law, and you have no option of coverage.

So if you limit these inspections to exclude the small companies, who are the most guilty of cutting corners to make a buck, if you exclude them, then you're putting these workers in a position where if anything happens to them they have the benefits from the worker's compensation law, which is ludicrous at best in the State of Virginia.

That's all they have. That very law precludes any other protection. Again, I am continuing to feel more and more frustration. I feel the individual has nobody on their side.

To be very honest with you, there was no one concerned with my son's life. There isn't anyone now. I wrote to the Governor twice and he could be less concerned. All I had to do was bring it to his attention and now he's working in the other direction. They don't want anything to disturb the construction companies, and if the people have to pay with their lives, that's it.

Thank you for listening.

Senator **Schweiker**. Thank you very much.

As you probably are aware, this committee has before it legislation regarding State workers' compensation laws. The criticisms you're making are obviously directed to the State laws. We do have a bill that several Senators have introduced dealing with the problem federally, but obviously that's not before us right now. But I think you have raised some very interesting points that the Committee has thought about in the context of the workers' compensation legislation.

We thank you very much for your helpful testimony.

Mrs. **Baker**. Thank you.

Mr. **Carper**. Senator, I have two more witnesses that I would like to present, if you have the time.

Senator **Schweiker**. All right.

Mr. **Carper**. And I might say that under the workmen's compensation provisions, when you referred to the $1,000, this is the death benefit. And if the person doesn't have dependents, this is it.

The next person that I would like to introduce is Clarence Quisenberry. He is president of the Oil, Chemical and Atomic Workers Local 3-495, Radford, Va. Mr. Quisenberry represents the employees at the Hercules Powder Co. at the Radford Arsenal. They encountered a serious explosion recently which he would like to relate to the committee.

Mr. **Quisenberry**. Thank you, Mr. Carper.

Senator Schweiker, the OSHA standard and its enforcement is vital to the workers at the Radford Army Ammunition Plant. To weaken the Occupational Safety and Health Act, such as S. 2153 proposes to do, would increase the existing hazardous conditions which the workers are now exposed to.

I would like to cite several instances that have occurred at the Radford Ammunition Plant. In 1970 we had two workers killed in a preblending powder operation. In 1971 we had two workers killed in a preblending powder operation. In 1974 we had 100 workers injured in one incident of a TNT explosion, which I might add destroyed the TNT plant. In 1978, we had two workers killed in a nitroglycerin explosion that destroyed the nitroglycerin plant. In the year 1978 we had at least 10 workers injured in other instances.

Now, this doesn't mean there hasn't been other instances where workers have been injured.

I would like to elaborate just briefly on the TNT explosion in 1974. This explosion could have been prevented and would have been prevented had the employer adhered to the safety suggestions by the workers and by the union.

In 1978 we had an incident where two employees were seriously injured. Another employee working in this operation had offered suggestions to his supervision for improvements and corrections of 16 different violations, or 16 unsafe working conditions. This was in a powder pressing and blocking operation. The supervision ignored these unsafe conditions.

He made a personal appeal to the plant manager and the plant manager ignored the existing problems. Consequently, several days later, a fire and explosion occurred in this operation, seriously injuring the two employees in this operation. This could have been prevented and would have been prevented had the safety suggestions been adhered to by the employer.

I call this to your attention because I want you to imagine what the working conditions would be like at RAP if we did not have OSHA. I submit to you that this bill, S. 2153, contributes to destroying the workers' protection that is now provided OSHA and protecting the employers from proper safety and health measures.

Thank you.

Senator **Schweiker**. We thank you very much.

I understand you have one more witness?

Mr. **Carper**. My final witness, Senator Schweiker, is Mr. Rufus R. Foutz. Butch is the secretary-treasurer of the Virginia State AFL-CIO and he has an incident that he would like to relate that happened just this week.

Mr. **Foutz**. Thank you, Senator.

I received a call yesterday that I will relate to you, as to what happened in that phone conversation. On March 26 there was a union election in Galax, Va., and immediately upon counting the ballots and finding that the union had won the election, the company locked all of the fire doors and exits in the building. Since that period of time all the employees have been required to work with only one exit door open.

The union immediately went to management and tried to get the doors opened, and they got no response. The election was on the 26th. On the 27th they telegramed the attorney general of Virginia. To this date they have received no response to the telegram.

They asked the fire chief in town to go down and inspect the building and get the doors open. He phoned the plant manager and was told that the doors were unlocked. He has never gone down and checked the building. So yesterday they called me and asked for some assistance in trying to get the fire doors opened.

We called OSHA, and within 45 minutes after I called them they responded and said they were sending somebody down to inspect the plant. At this point I don't know whether they have gotten there or whether they have inspected or not, or what they have found.

My point is, if we didn't have OSHA to turn to, where would we go?

Senator **Schweiker**. Thank you very much.

Mr. Carper, anything else?

Mr. **Carper.** Senator, I had asked Mr. Arnold Brown, who is vice president and regional director of the Paperworkers International Union, to come with me this morning and to relate in detail an accident down at the Westvaco Corp. in Covington, Va. He was unable to come, but he gave me a written statement that I gave to Mr. Goldberg this morning.

In there I would like to point out that there were 81 citations that were issued in this one plant. Ten of those, he states, could have caused death. Now, the company has made efforts to correct all of these 81 violations.

But the point I think we're making, if it were not for the penalty provisions that are provided in OSHA, it wouldn't have happened.

In March 1980, just a month ago, at the same corporation, seven persons lost their lives in serious accidents. The Federal OSHA inspectors were the first to appear on the site, and they are handling that situation.

We have tried to support in our written testimony and with the presentation of these witnesses this morning of the reasons why we oppose the Schweiker amendment.

In closing, I would like to read a letter I wrote to the Honorable Robert S. Beard, who is the commissioner of the Virginia Department of Labor and Industry, and who has the responsibility of administering the Virginia OSHA plan. I think this will emphasize some of the problems that develop when State agencies are in charge.

I have obtained, I say to Mr. Beard, from the workmen's compensation, or the industrial commission, a list of the number of fatalities in Virginia by month for 1978, and the first 10 months of 1979. In 1978 there were 237 fatalities in Virginia, and for the first ten months of 1979, there were 182. In order that I might be able to speak intelligently on some of these problems, I wrote to Mr. Beard and said I had obtained from the industrial commission a list of the on-job fatalities that have occurred in Virginia, month by month, during 1978 and January through October 1979.

> I would appreciate the following information with respect to these fatalities: The name of the employer, the nature and cause of death, was the death due to unsafe conditions, had the employer been previously issued a citation for unsafe work areas or conditions, was the employer fined as a result of the death, and if so, how much; had the employer been fined before, and if so, how much.

Now, I received from him a very prompt reply. He says:

> Dear Mr. Carper: You state in your letter that the industrial commission—

And they're the ones that handle the workmen's compensation—

> has provided you with a list of on-the-job fatalities. Upon checking with the commission, the list you have is really a count of the fatal claims established in 1978 and 1979, and injuries that eventually resulted in death and a fatality claimed in 1978 may have occurred in 1977. Further, the list includes all deaths which were job related, but not all such deaths are within the purview of the Virginia OSHA or OSHA safety inspections.
>
> The list includes such unrelated safety instances as airplane crashes, gunshots, automobile accidents, heart attacks and other unique categories. Thus, the large majority of the claims submitted to the industrial commission do not warrant an inspection.
>
> Currently the department of labor and industry does not encode the data from the commission's claim sheets to incorporate this into its management information system. We are therefore unable to provide you with the information relating to the industrial commission claims forms.

However, they may be able to provide you with the requested information on a cost basis. I am sorry I am unable to fulfill the data.

I think this is a perfect example of what we get into when we have State agencies and authorities in charge. When you try to get some basic facts, that we certainly felt we were entitled to, we get back a letter which just evades the question and doesn't speak specifically to the questions that we raised.

So this is a further example, I think, of why we find that there are some problems with the amendments that have been offered.

Mr. Chairman and gentlemen of the committee, I do appreciate the time and the courtesy that you have extended to me and the opportunity to appear before your distinguished committee.

Senator **Schweiker**. We appreciate your testimony and that of your colleagues.

Your testimony primarily addresses the State plan option, about which I think you have raised some very critical questions and very serious problems. Hopefully, OSHA itself will respond to your inquiry very, very promptly. I think in view of what you brought up today you're entitled to a very quick response to your petition to OSHA regarding the Virginia State plan.

We appreciate your testimony and certainly will take it into consideration. Thank you for being here.

Mr. **Carper**. Thank you so much.

[The prepared statement of Mr. Carper follows:]

TESTIMONY

by

JULIAN F. CARPER, PRESIDENT OF VIRGINIA STATE AFL-CIO

on

THE SCHWEIKER AMENDMENT

before

THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

April 17, 1980

Mr. Chairman:

I am Julian F. Carper, President of the Virginia State AFL-CIO.

Millions of Americans are threatened by occupational health and safety dangers each year. In 1970, Congress established the Occupational Safety and Health Administration to help workers and employers combat this serious problem. Yet, plagued by an unsupportive Administration, a weak and politicized implementation procedure, extensive and draining litigation, and consistent attacks by Congress and industry, the OSHA Act is only now beginning to realize its true potential. Under the sound leadership of Eula Bingham, the Occupational Safety and Health Administration is mounting an all-out attack on safety and health hazards through effective and vigilant enforcement, responsiveness to worker initiated reporting, stringent standards, substantive penalties, and employee and employer education campaigns. Granted OSHA is not perfect, it is working well and workers are beginning to trust the Act because they can see results. Now is the time to enforce and reinforce OSHA rather than dismantle the Act through the passage of the Schweiker Amendment.

And, despite any of its previous problems, there has been a 14% decline in total injuries during the Act's existence and in one year alone, 1977 - 1978, a 10% reduction in work-related fatalities.

As President of the Virginia State AFL-CIO representing 90,000 organized workers and speaking in the interest of all of Virginia's workers, I would like to address two aspects of the occupational safety and health issue. First, we want to make it clear that the Virginia AFL-CIO supports OSHA in its present form. We do not in any way, shape or form, support the proposed changes contained in the Schweiker Amendment. In fact, we want to be included under the jurisdiction of the Federal OSHA plan, rather than remain in our present condition under the jurisdiction of the Virginia OSHA plan, which for the last four years has made a mockery of the very concepts and goals of workplace health and safety hazard prevention.

We in Virginia are currently requesting the withdrawal of the Virginia Occupational Safety and Health Plan and are requesting to be included within the jurisdiction of the federal plan. (I will speak to this later in my statement.) Therefore, in speaking out today, we are reaffirming our support for the continuation of OSHA in its present form. We want every worker in Virginia to be covered by the kind of plan that is responsive to employees rather than prejudiced towards employers, and whose goal is the elimination of health and safety hazards through preventative measures. The Schweiker Amendment contains many of the weaknesses which undermine the effectiveness of the Virginia Plan. We do not wish these inadequacies to be inflicted upon the rest of the nation.

Why do we oppose the Schweiker Amendment? Although we certainly support the concept of voluntary compliance, we have seen time and time again that it does not work. The Schweiker Amendment waters down the enforcement powers of OSHA and relies on a system of voluntary compliance and employer initiated safety improvements. However, OSHA was created precisely because employers have not demonstrated a willingness to voluntarily provide a healthy and safe environment for their employees. Certainly, there are exceptions to this case, but these are clearly the minority. There is no reason to assume this will change by exempting employers from the law.

Rigorous standards, stringent penalties, unrestricted walk arounds and wall-to-wall inspections and employee participation have all been a critical part of the OSHA law because employers on their own have not fully investigated the health and safety aspects of the work environment. Too many times, employers have ignored hazardous conditions to get a job done; too many times, they have taken the short cut in order to increase production and profits rather than using the safest means possible and too many times, they have not considered health and safety implications of the machinery, chemicals and materials they use to manufacture their products. We can provide example upon example of companies failing to voluntarily adhere to safety and health standards, such as the cases of the Amoco explosion killing one person in 1977; and the recent case in which OSHA fined Tenneco Shipyards in Newport News for 54 willful, 473 serious and 37 repeat violations, with fines totaling $786,190.00.

The criteria that Schweiker calls for to determine exemptions does not encourage the creation of a healthy and safe workplace, but rather the appearance of one, and the standard for what it considers healthy and safe is a far cry from anything that OSHA has proposed.

The Amendment bases its determinations on industry's own injury records rather than on workplace conditions, changing OSHA's focus from eliminating hazards and preventing injuries to cleaning up after injuries have already occurred.

And how will employers determine the hazards existent in their workplaces? OSHA currently employs over a thousand safety inspectors and hundreds of industrial hygienists explicity trained in the recognition of both the obvious and the not so easily recognizable health and safety hazards. Is every employer going to attend an occupational health and safety hazard recognition program? What will be their standard for measuring safety conditions?

The only standard which Schweiker uses for determining a healthy and safe workplace are the worker compensation records. All employers with a workplace of more than ten employees who have had no accident related deaths and fewer than two lost time days per hundred employees per year verified through workers compensation or attested to through an affidavit would be eligible for exemption. However, the workers compensation system is widely known to not accurately reflect true safety rates. It is no hidden fact that employers frequently opt for the route of not filing for workers compensation, and this provision would either encourage the already common practice of paying injured workers to sit all day in a lunch room or company office, to send the worker home on company time, or be examined by a company doctor whose source of income often prejudices him in his determination of the cause of injury or disease.

With lost time days being the criteria for exemption from OSHA investigations and regulations, this will provide a direct incentive for employers to bend the law by continuing the practice of underreporting and will avoid, unless absolutely necessary, the process of reporting injuries to workers compensation.

According to Schweiker's calculations, this would allow 90% of all workplaces to be exempt from OSHA's jurisdiction. Schweiker provides for a system whereby employers themselves can determine their own eligibility for exemptions. There is no independent investigation, no procedure for verification, and there is no emphasis on protection. The exemption process provides the ways and means for management to do a halfway job. And with thousands of workers being hurt or killed each year, halfway is not enough.

Once a company qualifies for an exemption, the intent of the Occupational Safety and Health Act is further eroded. A qualified workplace becomes free from OSHA inspections unless a serious accident occurs resulting in one fatality and the hospitalization of at least two workers. If workers in an exempted business requests an investigation, the problem would be first referred to the company who only needs to provide verbal assurances that the hazard either did not exist or had been abated. If finally, an OSHA inspector did come to investigate, the employer would be given advance notice, which as we all know, allows sufficient time to clean up and straighten up the workplace.

In addition to making a mockery of all the intent and goals of the Occupational Safety and Health Act, the Amendment goes even further to undermine the whole nature and rationale for labor-management health and safety committees. The Schweiker Amendment calls for the establishment of labor-management health and safety committees yet provides no guarantees that these committees will be allowed to function effectively. The mere presence of a health and safety committee or consultation service, means that the company will be exempted from most penalities and fines for any violation. However, this committee need only be advisory and there is nothing within the amendment which requires the employer to pay heed to the recommendations from the committee, and as a matter of fact, even the health and safety committee's recommendations are not considered in the determination of a willful violation in an exempt worksite.

The list goes on . . . And, in the end, OSHA's purpose would be redirected and diverted from enforcement and education to the processing of thousands of affidavits and the development of an information system by those state workers compensation agencies who would be able and willing to participate to determine employer eligibility and exemption. Even if willing, the Virginia agency is not able to become an effective partner. In other words, the Act would be stripped of its effectiveness and intent.

The damage that the Schweiker Amendment will inflict is widespread, but no one will suffer more than the unorganized worker, who without the strength of a union behind him or her, will be at the mercy of an employer who does not voluntarily bring the workplace up to the highest health and safety standards. There are 1,900,000 unorganized workers in Virginia alone whose right to a healthy and safe work environment will be once again threatened. An organized plant can develop contractual language or use the strength of the union to acquire higher standards of safety, and with health and safety and education experts in their international unions and labor education programs at their disposal, can potentially transform paper labor-management health and safety committees into strong committees. It is only through the force of the union and the security that unionization provides that employees can really file complaints and call for investigations of hazards. Even under the current OSHA laws, employees have been subjected to employer retribution for filing complaints — what will happen to these unorganized employees if the Schweiker amendment goes into effect?

As I had mentioned earlier, Virginia's working people are facing two obstacles in trying to obtain their right to a safe and healthy workplace. First, the Virginia Occupational Safety and Health Plan has proven to be inadequate and has demonstrated a flagrant disregard for the health and safety of the working men and women of Virginia. At the same time that we are trying to obtain coverage under the Federal Occupational Safety and Health Administration the Schweiker Amendment is threatening to diminish the effectiveness of the federal act.

Even through the purpose of the hearing today is not directly related, I would like to take a moment to discuss our complaints against the Virginia OSHA Plan.

Virginia's Occupational Safety and Health Plan is woefully inadequate. The fifth evaluation report based on the period from October 1, 1978 to September 30, 1979, contains numerous irregularities and inadequacies which have not been satisfactorily corrected in the four years of the plan's existence. Thus, it is clear that the Virginia Plan is "not as effective as" the Federal OSHA plan, and its very existence allows the continuance of serious and dangerous health and safety hazards.

The Virginia OSHA Plan has consistently violated the concept of employees rights and representation. Employee representatives have not been included in all walk around inspections, or fully informed of their rights as employees. Where employees are unionized, the union has not been properly identified, or as in complaints filed by the United Food and Commercial Workers, the Oil, Chemical and Atomic Workers and the Amalgamated Clothing and Textile Workers Union, the union was not properly informed of the proceedings; not included in the closing conference and denied access to the records and results from the walk around inspection. When union representatives have tried to obtain the information on the health and safety proceedings, they have been denied access under the questionable use of Virginia's Freedom of Information Act.

The Virginia OSHA Plan has been found to be unduly prejudiced towards employers. I suspect unwarranted advance notice is sometimes given to employers prior to safety investigations. Improper hazard classification and the failure to identify the appropriate standard has resulted in inadequate remedies and undue leniency. The lack of proper follow-up procedures has produced a grey area in which there is scant knowledge as to whether violations have actually been cleared up and hazards remedied. The penalties assessed by Virginia OSHA are notoriously low, with the maximum of $1,000 for serious violations rarely reached. The fifth evaluation report recommended that fines of less than $1,000 are improper, and fines such as the $400 assessed for a safety hazard resulting in the death of a construction worker is ludicrous.

The judicial process which governs the enforcement of OSHA investigations and guidelines has been judged inadequate by Federal OSHA and been found to be ineffective in protecting the health and safety of Virginia workers, and therefore "not as effective as" federal OSHA administrative enforcement process. Virginia OSHA rests enforcement of OSHA regulations on the 128 General District Courts, where by virtue of their role as independent general courts of law, hear a wide variety of cases. Their background as generalists, and thus their lack of expertise in areas of occupational health and safety impedes a fair trial on health and safety concerns. The independence of the General District Courts and the Commonwealth attorneys who prosecute the cases, and the lack of centralized supervision encourages the superflous enforcement of cases without the necessary expertise to adequately judge the cases. Moreover, the lack of a specialized reporting system impedes the development of a precedential base. The consequence of Virginia's judicial rather than administrative review results in a lack of uniformity and a less than effective enforcement procedure.

Lack of communication between the health department and safety department and a muddled interpretation as to the responsibilities and functions of each, has led to a situation where hazards are overlooked, not recognized and not reported because it is not within one or the others' "jurisdiction." Joint inspections and a communication system for the exchange of information which would facilitate the enforcement of health and safety standards is an obvious beginning step for an agency, if it wishes to take its mandate seriously.

Governor John N. Dalton recently testified in support of the Virginia State Plan and stated it was in Virginia's interest to have a plan that was "innovative, flexible and reflective of local needs." It is our opinion that innovation and responsiveness to local needs does not warrant ineffectiveness. The Virginia Plan in the four years of existance has never demonstrated the commitment to high standards, fair representation to employees as well as employers and the insurance of employee protection to warrant its continuance. The Plan's reliance on voluntary compliance, resulting in pitifully low penalities, and lack of proper follow up and abatement policies makes the plan "not as effective as" the Federal Standards.

In examining the basic problems which render the Virginia Occupational Safety and Health Plan inadequate and ineffective one cannot help but notice the similarity in weaknesses and grave deficiencies between the Virginia Plan and the proposed Schweiker Amendment.

Certainly, on the basis of the state's performance to date, reliance on the Virginia workers compensation agency is not warranted and points to a glaring hole in the Schweiker proposal.

Workers and union members in Virginia have banded together to petition the Secretary of Labor to withdraw the Virginia Plan on some of the very premises which threatened the sanctity and the sanity of the Federal OSHA Plan. We want the Federal OSHA Plan left intact -- we have seen through the Virginia example the futility of a plan based on voluntary compliance and riddled with problems such as: lack of fair representation to employees and undue prejudice towards employers, low penalties, ineffective enforcement procedures and lack of proper follow up and abatement policies. Virginia has proven that these provisions do not work. There is no reason to take a state's mistake and transform it into a national travesty.

Senator **Schweiker**. I call Mr. Richard Gallagher for the National Association of Manufacturers.

As the NAM is coming up, I do want to comment on one of the comments of the previous witness, Mr. Powell. Mr. Powell made a statement while I had to take a telephone call, and he mentioned in connection with the Willow Island disaster in West Virginia in 1978 that there were penalties of $100,000 for willful violations. Of course, he said, in essence, that my bill would have preempted those penalties.

Of course, this is absolutely not true. It's a problem I have had with people misinterpreting and distorting my bill.

The penalties were for willful violations and my bill does not reduce penalties if they're for willful violations. The $100,000 in fines for Willow Island were for willful violations, so it wouldn't have been touched by my bill at all. My bill does not deal with penalties for willful or repeat violations. We just heard testimony from Virginia that somebody had 80-some citations. My bill does not give any relief for somebody who has repeated violations, or willful violations.

Also in regards to Willow Island, my section 4(a)(2) has special provisions to get at serious problems such as Willow Island, regardless of what their safety record was.

Once again, I would like to set the record straight.

All right, Mr. Gallagher, would you please proceed.

STATEMENT OF RICHARD GALLAGHER, PRESIDENT, GALLAGHER CORP., APPEARING ON BEHALF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, ACCOMPANIED BY W. SCOTT RAILTON, NAM LABOR LAW ADVISORY PANEL; FRANCIS M. LUNNIE, JR., DIRECTOR, OCCUPATIONAL SAFETY AND HEALTH, NAM; AND WILLIAM E. BLASIER, ASSOCIATE GENERAL COUNSEL, NAM

Mr. **Gallagher**. Mr. Chairman and members of the committee, I am Richard J. Gallagher, president of the Gallagher Corp., in Gurney, Ill. The Gallagher Corp. manufactures industrial rubber products based on polyurethane technology and currently employs 21 people.

While my industrial career has been almost equally divided between large and small business experience, I am here today on behalf of the National Association of Manufacturers, as a member of its Occupational Safety and Health Steering Committee, to express my views on S. 2153, the Occupational Safety and Health Improvements Act of 1980.

With me today are Scott Railton, of the law firm of Reed, Smith, Shaw & McClay, on my far right, and a member of NAM's labor law advisory panel; Mr. F. M. Lunnie, Jr., the director of occupational safety and health for the National Association of Manufacturers, on my near right; and William Blasier, on my left, NAM's associate general counsel. We will be pleased to respond to any questions you may have at the conclusion of this statement.

Mr. Chairman, my oral presentation this morning is based on a more detailed prepared statement, which I would like to submit for the record at this time.

As was noted in the testimony before this committee during the recent oversight hearings, NAM has and continues to support the expressed objectives of the act. The National Association of Manufacturers has not supported efforts to abolish OSHA, nor have we been in favor of providing blanket exemptions from the act based solely on numbers of employees. And NAM believes strongly in the responsibility of employers to provide safe and healthful workplaces.

Mr. Chairman, we believe the act has had positive effects, perhaps the most important of which is the increased awareness of and sensitivity to safety and health issues on the parts of both employers and employees.

Despite the salutory effects of the act, however, it appears that OSHA's attempts to enhance worker safety have been less than successful. There is, after 9 years, little evidence to suggest improvements in accident statistics.

This, in turn, leads us to conclude, along with the sponsors of S. 2153, that fundamental changes to the act are needed if we are to realize its objectives. A positive step, in my opinion, would be the enactment of S. 2153, the Occupational Safety and Health Improvement Act of 1980. We sincerely believe that its purpose is in accord with the congressional intent underlying passage of the act of 1970; that is, to target OSHA enforcement activities where most needed, and to create incentives for employer self-initiative in occupational safety and health.

We view S. 2153 as a moderate, responsible attempt by the Congress to alleviate some of the more glaring deficiencies in the act's administration, and to bring a better balance to the OSHA program. I strongly believe that its concepts will encourage a better utilization of both OSHA and employer resources and thus will ultimately result in enhanced worker protection.

In our prepared statement, we have included a detailed discussion of NAM's supportive position for S. 2153, together with several suggestions which we believe would enhance the bill's ability to bring about the desired result. I will briefly summarize them here.

Clearly, the most important provision of the bill is its exemption of qualified employers, those who have consistently demonstrated by their performance that they have taken the initiative and accepted the responsibility for providing safe and healthful places of employment, employers whose established record warrants relief from the time consuming and all too often burdensome and costly aspects of routine OSHA enforcement activities.

S. 2153 provides a performance standard to which employers may aspire. For employers whose low injury rate experience demonstrates the presence of effective safety programs, relief would be provided. This is a results-oriented program that provides an incentive of the nature that NAM and others have stated is lacking in the current OSHA program.

I also believe that the performance exemption approach proposed in S. 2153 will provide incentives to employers to constantly improve upon existing safety programs, without depriving employees of any significant protections afforded by the act. In fact, it is far more likely that the targeting of OSHA resources to establishments with poorer safety records will result in an improvement in employee protection.

The penalty relief provisions of S. 2153 offer additional incentives to employers to achieve the stated performance levels, thereby further encouraging voluntary compliance.

While NAM strongly supports the underlying concept of S. 2153 to provide performance-based exemptions to qualified employers, we feel that adjustments to certain of the provisions would better enable the bill to achieve its stated objectives. The more important of these, include adjustments to the performance standard or targeting mechanism, and the required qualifications of certain consultation personnel.

The performance standard must be set at a level that is realistic and attainable, with continuing diligence on the part of an employer, so that it truly encourages action-oriented programs.

Further, we would encourage a mechanism that keys to an employer's performance relative to his peers in a particular industry sector, rather than a uniform standard which does not recognize that in both high- and low-hazard industries certain employers have more effective safety programs than do others.

With regard to consultants, we would suggest to the committee that the bill's present language is unclear on whether an employer's own safety and health professionals would qualify as a consultant. In either event, a number of significant problems are posed.

Excluding in-house professionals would exclude a large segment of the already limited number of safety and health professionals from participation in the program. Further, the present language implicitly questions the objectivity of these dedicated professionals, which, we submit, is a serious error.

On the other hand, if the intent is that in-house professionals can qualify, then the bill would permit OSHA to subject them to more stringent competency requirements than would be required of outside consultants. This, we submit, is uncalled for.

We would urge the committee to reconsider the bill's language and to expressly permit the use of in-house professionals to qualify pursuant to uniform competency requirements.

Finally, Mr. Chairman, in our prepared statement we have addressed a number of the exaggerated claims, blatant distortions and false allegations made by those who oppose S. 2153. We can say nothing more about this at this time, other than to urge this committee and the Congress to judge this legislation on its merits rather than on the basis of false allegations or misinformation.

In closing——

Senator SCHWEIKER. I just want to say, I certainly concur with you on that. There are many false allegations about this bill, and you point one out here, where the United Auto Workers is saying in the Washington Report that "the bill would exempt 90 percent of all workplaces from OSHA's jurisdiction." That is totally, absolutely false. It is sort of ironic, because the Schweiker amendment to the Church amendment won that point on the floor of the Senate last July.

So not only is the statement false, but I'm the guy who led the fight to stop it from happening. So I appreciate your mentioning it.

It's rather difficult to propose a bill when people keep printing falsehoods about it. I appreciate your giving me the entree to say that once again for the record.

Mr. Gallagher. In closing, we wish to commend the sponsors of S. 2153. The National Association of Manufacturers endorses the concepts of targeting and the recognition of employer performance as set forth in the bill. The bill would provide incentives to employers for building upon and improving existing safety programs as was clearly contemplated by the act and permit OSHA to utilize—both OSHA and employers—to utilize their resources more effectively.

The National Association of Manufacturers hopes that this testimony, our prepared statement, and the issues raised will assist the committee in its deliberations on S. 2153.

We would be happy to provide any further assistance that may be required in that regard.

[The prepared statement of Mr. Gallagher follows:]

National Association of Manufacturers

TESTIMONY

on behalf of

THE NATIONAL ASSOCIATION OF MANUFACTURERS

on

S. 2153 - OCCUPATIONAL SAFETY AND HEALTH
IMPROVEMENTS ACT OF 1980

before the

COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

April 17, 1980

1776 F Street, N.W. • Washington, D.C. 20006 • (202) 626-3700

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COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

April 17, 1980

The National Association of Manufacturers is a non-profit voluntary organization whose membership includes over 12,000 manufacturing and related concerns of all sizes from every state in the nation. The NAM and its affiliate organizations, the National Industrial Council and NAM's Associations Department, which are comprised of over 158,000 firms, together provide nearly 80% of the goods manufactured in this country. While our members include many of the nation's largest companies, almost 80% of our member companies are generally considered to be small businesses.

The NAM wishes to commend this Committee for scheduling these hearings and for the opportunity to offer testimony on S. 2153, the Occupational Safety and Health Improvements Act of 1980, a bill whose concept NAM fully endorses. We applaud also the Committee's wisdom in holding the recently concluded oversight hearings on the Occupational Safety & Health Act (the "Act") so experience under that statute might be reviewed and the problems attendant to its administration might be discussed. NAM believes that having first examined where we have been during the past decade, we now have a proper perspective from which to consider reasonable adjustments and changes that would better facilitate the realization of the Act's primary objective of enhanced worker protection.

At the outset, we wish to reaffirm NAM's support of the goals and objectives of the Occupational Safety and Health Act of 1970. Beginning with the early legislative debates that culminated in passage of the Act, NAM has steadfastly maintained that employers are responsible for providing a safe and healthful working environment and for conducting effective safety and health programs. Recognizing that such programs are essential to good employee relations and consistent with sound business practices, we believe that employers must take the initiative to fulfill these responsibilities.

NAM's supportive position in this regard is based in large measure on our members' realization that the Act has had positive effects, perhaps the most important of which is the increased awareness of and sensitivity to safety and health issues by employers and employees.

Although the commitment of many of this nation's employers to worker safety and health predated the passage of the Act by many years -- indeed, NAM's first Occupational Safety and Health Committee was formed in 1949 -- the Act has served to reinforce and to impress upon all employers the need to attach a higher priority to their efforts in this area. Similarly, many of the procedures and reporting requirements mandated by the Act have assisted in identifying areas where improvement is needed.

Need for Reform

Nevertheless, despite the Act's positive effects and the efforts of business groups such as NAM, our experience with OSHA over the past nine years leads us to believe, along with the sponsors of S. 2153, that improvements to the Act are very much needed. While it is sometimes difficult to rely completely on statistics for any proposition, we believe a credible argument can be made from the available data on workplace injuries that OSHA has not achieved demonstrable reductions in the incidence of injuries and illnesses in the workplace, particularly in view of the amount of time, energy, and money that has been devoted to this purpose both by the government and the private sector.

Perhaps even more disturbing is the demonstrated inability of the Occupational Safety and Health Administration to foster and promote the type of cooperation and coordinated effort between labor, management, and government that Congress quite properly recognized would be essential to fulfillment of the Act's promise. Instead, achievement of the Act's goals has been continually frustrated largely by the creation of an adversarial environment characterized more by confrontation than by cooperation -- a situation fueled by a general perception within the business community that the administration pays little attention to legitimate business concerns and is much more frequently responsive to the concerns of organized labor. Also, many of the administration's unduly rigid policy positions and enforcement strategies have served to further undermine efforts to achieve safer and more healthful working conditions.

Simply stated, our experience over the past nine years leads us to the conclusion that the time has arrived for a comprehensive reexamination of many of the fundamental concepts which underlie the government's present approach to occupational safety and health. For example, the administration of the Act since its passage has in many respects raised barriers to the realization of dramatically improved worker protection: it has lacked a comprehensive and consistent regulatory strategy which is conducive to the development of responsive safety and health programs in industry and, at the same time, provides for effective utilization of OSHA's limited resources.

So too are there serious questions concerning the basic utility of routine OSHA inspections as a primary mechanism to bring about improved safety. Thus, the Final Report of the Interagency Task Force on Workplace Safety and Health concluded that:

> "[P]erhaps 25% of injuries are preventable by enforcement of present OSHA standards. About three-quarters can probably not be prevented by present enforcement, either because their causes are not covered by standards or because they involve transient conditions that are difficult to detect during inspections." (Emphasis added)

The Task Force continued that:

> "The problem is magnified by the fact that the present OSHA program attempts to control workplace hazards by all-inclusive direct monitoring, rather than managing by exception to focus on selected areas where serious problems are indicated." (Emphasis added)

As noted in our previous testimony, a proper regulatory strategy would encompass a range of elements including good standards, sound enforcement policies and compliance procedures, training and education, and consultation. None of these elements, however, can stand alone. Neither can they facilitate improved workplace safety and health unless they are complemented by encouragement and incentives, such as were clearly contemplated by Section 2(b)(1) of the Act.

In this regard, we view S. 2153 as a moderate, responsible attempt by the Congress to begin restoring a proper balance to the system. We believe S. 2153 would serve to alleviate some of the more glaring deficiencies in the OSHA program, relieve employers with effective safety programs from the onerous, often punitive, burdens of routine low priority OSHA safety inspections, and encourage these and other employers to constantly improve and build upon existing safety and health programs. NAM strongly believes that the concepts embodied in this bill will encourage a better utilization of both OSHA and employer resources and thus, will ultimately result in enhanced worker protection.

Employer Performance

In general, S. 2153 would simply require OSHA to carry out what it has stated is its own policy with regard to workplace inspections, that is, to focus agency resources on the most hazardous workplaces and the most serious hazards and to emphasize voluntary compliance mechanisms. The bill provides a performance standard to which employers may aspire. For employers whose injury experience demonstrates the presence of effective safety programs, relief is provided.

This is a results-oriented approach and one that provides an incentive of the type NAM and other representatives of the business community have stated is lacking in the current OSHA program. This incentive, i.e., relief from routine safety inspections, would provide motivation to employers to build upon and improve their existing safety programs. Further, this concept reflects one of the more important conclusions of President Carter's Interagency Task Force on Workplace Safety and Health. Performance exemptions would establish additional motivation for employers to improve their safety performance and programs and would permit OSHA to redirect their limited inspection/enforcement resources to high injury-rate firms and industries. We believe that the performance exemptions proposed in S. 2153 will provide employers additional incentives without depriving employees of any significant protections afforded by the Act.

Moreover, this approach makes good sense. While the employer is provided with recognition of his safety efforts, OSHA can more effectively focus its limited resources to those areas where they are required.

Also designed to advance the Act's stated objective of emphasizing voluntary compliance mechanisms are the penalty relief provisions of S. 2153 (Section 4A (d)). Monetary penalties for serious and other than serious violations are eliminated if a qualified employer either (1) maintains an advisory safety committee and consultation program or (2) employs not more than 10 employees. This provides an additional incentive to achieve the performance level. Non-qualified employers who utilize committees and consultants would be able to obtain more limited relief from these penalties if they so chose.

We believe that exempting qualified employers from the provisions of Section 8 and 17 of the Act, except for willful, failure to abate and health violations, strongly comports with the expressed Congressional intent that OSHA encourage voluntary compliance.

NAM cannot offer any specific comment on the advisory committee provision (Section 4A (d)(1)) as there is no consensus among our members. We would, however, observe that the use and effectivenss of such committees varies from industry to industry and within industries. We note, further, that the use of committees is voluntary, and for all practical purposes, employees have de facto veto power over penalty relief for non-qualified or large employers.

We submit that after nearly nine years in existence, OSHA has not accomplished its stated objectives and the administration has more often acted as an impediment to such achievement. If, as an increasing number of reports and analyses indicate, there is no documentation that OSHA has had any measurable impact on accidents or illnesses in the workplace, there is, at the very least, ample evidence that the approach of simply setting standards and enforcing compliance through inspections and penalties is not having the desired result. We must not obscure the Act's objective of reducing occupational injuries and illnesses by permitting it to become lost in a system of penalties and inspections that may not best utilize the resources available to both OSHA and industry to carry out the Act's promise.

Suggestions for Strengthening S. 2153

While communications with our membership clearly evidences support for the underlying concept of a performance based exemption as set forth in S. 2153, it is also felt that adjustments to certain of its provisions would enhance the bill's ability to achieve the desired results. In this regard, we wish to offer our observations on several of these provisions, and would commend their consideration to this Committee in its deliberations on S. 2153. They concern the (1) targeting mechanism, (2) consultative services, and (3) definitions.

S. 2153 provides a performance standard for employers to meet, the achievement of which would result in relief from some kinds of safety inspections. Great care must be taken, however, to ensure that the performance standard is realistic. We do not assert that the exemption should be easily obtainable, but rather only that a level of performance be established so that with continuing diligence on the part of the employer it can realistically be attained. The mechanism for targeting should be one that motivates and provides incentives to the majority of employers to constantly improve their programs. As now provided by the table in Section 4A (c)(1) of the bill, most firms in low hazard sectors, e.g., banking, retail trade and insurance carriers, would obtain relief. The threshold or performance level, however, is too high for what the Interagency Task Force on Workplace Safety and Health referred to as "relevant industry." Thus, NAM would encourage the Committee to consider adjusting the targeting mechanism in such a fashion as to establish a goal that is more realistic and attainable, thereby encouraging action-oriented programs.

Such a mechanism might be one that keys on the performance of an employer relative to his peers in a particular industry sector. This provides motivation to a larger number of employers than are presently encompassed within S. 2153 and it also recognizes that in both high and low hazard industries, certain employers are more concerned and have more effective safety programs. Further, to ensure that qualifying employers continue to improve upon their existing safety programs, the performance level might be adjusted periodically to encourage even better performance.

At the same time, we question the wisdom of using workers' compensation data. Differences in the reporting requirements between the states and the "no-fault" nature of workers' compensation cases pose significant potential problems. For example, an accident in a company parking lot could be claimed as compensible; it is not job related, however, in the OSHA context.

Consultation

With regard to the provisions in the bill concerning qualification for relief from penalties, NAM members have expressed reservations about the concurrent requirements for advisory committees and consultative services. We have addressed advisory committees previously and wish now to focus on consultation.

Our reading of the bill's language relative to consultants leaves us unclear as to the status of "in-house" safety and health professionals (Section 4A (g)). If, as is our understanding of the intent, such professionals cannot qualify as consultants, NAM strongly believes, for a number of reasons, that this issue should be reconsidered. First, many employers have long-standing safety and health programs staffed with dedicated, experienced professionals who, except for their employment, would otherwise qualify as a consultant under this bill. Second, the largest portion of board certified safety and health professionals reside in the private sector. Third, it is unreasonable to expect that private outside consultants would generally have the expertise and experience necessary to provide advice on the diversity of processes across industry and, certainly, such consultants generally would not be as informed as the in-house professionals on all of the different aspects of a particular workplace. Finally, it does a great disservice to the dedicated industry professionals to assume that because their paycheck comes from the employer, they are less than conscientious or objective. Although we doubt that this was the intent of the provision, such an implication may be drawn.

If, on the other hand, it is not the intention to exclude in-house personnel, another problem is raised. In-house professionals would have to qualify under competency standards established by the Secretary (Section 4A (g)(1)(D) whereas outside consultants would qualify merely by virtue of their professional standing. We see no reason for this dichotomy and, certainly, none for imposing more stringent requirements for the qualification of in-house professionals. Competency requirements should be uniform.

Definitions

Other suggestions for the Committee's consideration include the definition of "workplace" (Section 4A (a)(4)). We are not convinced that a new definition of "workplace" is necessary, or desirable. Each employer with multiple locations already has defined "establishments" for purposes of OSHA recordkeeping (See 29 CFR 1904.12 (g)). We would much prefer to see this existing definition used in place of the proposed, more complicated, definition of "workplace". Factors which delineate an establishment (workplace) can include commonality of management, location, function, contractual labor agreements, and union representation, to name a few. Employers are concerned that any new definition of workplace will complicate or change the existing satisfactory understanding of "establishment." Organized labor tends to be concerned that the intent of the new definition is to divide establishments into small "workplaces" which can then qualify individually for "performance exemptions." Consequently, serious consideration should be given to using the existing definition of "establishment" as set forth in OSHA regulations.

In a similar vein, NAM would encourage the Committee's reconsideration of the bill's first exception to the inspection exemption (Section 4A (a)(1)(A)). To make this provision consistent with OSHA's existing regulations (See 29 CFR 1904.8), it should be revised to read as follows:

> "(A) determining the causes of a serious workplace accident which resulted in the death of one or more employees or the hospitalization of more than four employees." (change emphasized)

Opposition to S. 2153

While opposition from organized labor is not unexpected, its tenor and bitterness have reached far beyond the bounds of reasonable advocacy. This opposition includes personal attacks on several sponsors of S. 2153, which attacks we find most distressing and unfair.

It also includes distortions of the provisions of this legislation which, although perhaps helpful in rallying rank-and-file union members, disserve both those members and the legislative process. To ensure the record is clear on what S. 2153 proposes, we feel a response to several of the more blatant allegations is in order.

The United Auto Workers alleged in their Washington Report of January 11, 1980 that the bill "would exempt 90% of all workplaces from OSHA's jurisdiction." This is totally false. The exemption in S. 2153 applies only to workplaces with good safety performance, and only from routine safety inspections. These workplaces are not exempt from health inspections, complaint, accident, and follow-up inspections, or the duties to provide a safe workplace and comply with all OSHA standards.

Similarly, the AFL-CIO is telling its members S. 2153 "[t]akes away workers' statutory right to an OSHA inspection in response to a valid, formal complaint of safety violation." ("Fact Sheet on the Schweiker-Williams Occupational Safety and Health Improvements Act of 1980 - S. 2153", dated 1/21/80).

Again, this is completely false. S. 2153 has two provisions permitting complaint inspections. First, it permits an inspection if the complaint alleges "an imminent danger or other hazard so serious in nature that it warrants the expeditious attention of the Secretary ..." Secondly, the bill permits inspections for other complaints "if the employer has first received notice" and "has failed to provide to the Secretary satisfactory assurances that appropriate action, if any, has been taken to correct the violation."

It is important to note that OSHA recently implemented similar procedures for handling informal complaints (OSHA Instruction CPL 2.12A, dated September 1, 1979). In so doing, OSHA observed that investigating all complaints had resulted in a serious backlog, "many of which do not deal with serious hazards", and diverted resources away from high hazard workplaces. OSHA also called for a screening of complaints relative to the conditions alleged. Thus, S. 2153 really does little more than extend OSHA current policy to formal complaints. While we recognize the importance of the complaint mechanism to worker safety, NAM does not believe it is in any way diminished by S. 2153.

Another example is the statement of the United Steelworkers of America, in the February issue of Steelabor, that S. 2153 would "eliminate all fines for safety violations in plants with 10 or fewer workers."

This, too, is false. First, the penalty provisions in the bill apply only to penalties under section 17(b) or 17(c) of the Act, or, in other words, only to first instance penalties for serious and nonserious violations. The bill does not affect willful or repeat penalties under section 17(a), failure to abate penalties under section 17(d), or the criminal willful penalties under section 17(e). Secondly, the penalty exclusion for small business applies only to firms which have experienced no lost-time injuries during the previous year. We would add parenthetically that exempting nonhazardous small businesses from routine, first-instance penalties has already been passed by Congress in the FY-80 Labor-HEW Appropriations Act, and is now in effect.

These are just a few of the blatant distortions we have seen. It is not our intention to berate any organization which opposes S. 2153, and we are certainly willing to assume these distortions were unintentional. But it is critically important that the Committee and the Congress judge this legislation on its merits, not on the basis of false allegations or pressure based on misinformation.

Summary

In closing, we wish to commend the sponsors of S. 2153. NAM endorses the concepts of targeting and the recognition of employer performance as set forth in the bill. The bill would provide incentives to employers for building upon and improving existing safety programs as was contemplated by the Act and would permit OSHA to utilize its resources more effectively. NAM hopes that this testimony and the issues raised will assist the Committee in its deliberations on S. 2153. We would be happy to provide any further assistance that may be required in that regard.

QUESTIONS

1. In your formal statement, you suggest that the exemption criteria in S. 2153 may be too stringent, especially for employers in the so-called "high hazard" industries.

Your suggestion, as I understand it, is that exemption criteria be adjusted depending on the nature of the industry, and that employers within a given industry, even a high hazard industry, should be able to win an exemption if that company performs better than its peers in the same industry. It seems to me that under such a scheme, we would be targeting for inspection, the worst performers in the safe industries, while exempting the best performers in the most hazardous industries, even though the latter may still be many times more dangerous than the former.

I believe that this miscasts the purpose of the exemptions, and would seriously reduce the protections available to workers in the high hazard plant. It also impresses me as a waste of OSHA's resources. What are your views?

2. You suggest, in your formal statement, that you question the wisdom of using workers' compensation data in order to evaluate the hazardousness of a particular workplace.

Is your criticism based on your belief that lost workday injuries are not an accurate measurement of the hazardousness of the workplace? Or, is your concern about the availability and useability of the workers' compensation data? What would you propose as an alternative to workers' compensation data?

NAM
National Association
of Manufacturers
Industrial Relations Department

'80 MAY 22 PM 12:18

May 22, 1980

The Honorable Harrison A. Williams, Jr.
Chairman
Senate Committee on Labor & Human Resources
Room 4230 - Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Mr. Richard J. Gallagher, President of Gallagher Corporation, has asked that we reply to your letter regarding the testimony he presented at the Committee's hearings April 17, 1980, on behalf of the National Association of Manufacturers.

We have enclosed responses to the two questions posed in your letter and trust that you will find them beneficial to the Committee's deliberations on S. 2153, the Occupational Safety and Health Improvements Act of 1980.

We are most appreciative for having had the opportunity to participate in the hearings on this important issue and stand ready to assist the Committee as may be required.

Should there be any question on the enclosed or any other issues, please do not hesitate in contacting us.

Sincerely,

F.M. Lunnie Jr

Francis M. Lunnie, Jr.
Director
Occupational Safety & Health

FML/lj

Enclosure

cc: Richard J. Gallagher

1776 F Street, N.W.
Washington, D.C. 20006
(202) 626-3700

Responses to Questions

1. Mr. Chairman, I believe that the ultimate objective of this provision of the bill is, or should be, the more effective targeting of OSHA resources so that the greatest improvement in worker safety and health may be effected. In our statement, we suggested that, in both high and low hazard industries, there are employers whose efforts at providing for the safety and health of their employees have been more effective and conscientious than others in the respective industries. Given the presence and maintenance of effective safety programs, even in high hazard industries, it is unlikely that OSHA inspections will result in significant improvement in the conditions at the particular firm. If the employer has a good program and, relative to his peers, good accident experience, we are suggesting that targeting such an employer for inspection is not an effective utilization of OSHA resources.

2. The reporting requirements under workers' compensation laws vary from state to state, for example, in the amount of time away from the job before the accident is to be reported. In addition, I believe we suggested that a given workers' compensation claim, because of the underlying concepts of workers' compensation law, does not necessarily bear any reasonable relationship to the existence of a condition which is cognizable under the Occupational Safety and Health Act. For example, a fall in a company parking

lot resulting in a broken limb in all likelihood would be compensable, but may have absolutely nothing to do with a condition that violates any OSHA regulation or requirement. Therefore, workers' compensation data may not provide an accurate representation of worker safety and health within the context of this statute.

As to an alternative mechanism, the OSHA Form 200, perhaps with some refinement in the reporting procedures, might be a possibility. It's in place and is, in effect, an affidavit vis a vis injury experience.

Senator SCHWEIKER. Mr. Gallagher, you recommend changing the safety record test in my bill to be based on industry averages rather than a national average. Do you feel that OSHA will not find serious violations in workplaces which are in hazardous industries but which have good records compared to their industries, or what is your rationale for that?

Mr. GALLAGHER. I believe that given the overall intent of OSHA to achieve abatement of hazards in industry, it would seem logical that if company performance when compared with other companies in their industry, was good, then there is little to be achieved by OSHA's enforcement. There wouldn't be any way to improve the manufacturer's safety performance if one compares it in those terms.

I feel the judgment should be based on a company's relative performance within an industry, so that we can determine which companies have good and which have poor safety performance.

Mr. LUNNIE. I wonder if I might add a little more to that answer, please.

Senator SCHWEIKER. Certainly.

Mr. LUNNIE. When Mr. Gallagher pointed to employers in both the high hazard and low hazard industries, those who have more effective safety programs and, consequently, better safety records than their peers, I think the point he was trying to make is the following. If you go into a manufacturer who has had and does have a good safety program, whose injuries are lower than those of his peers, it is unlikely that OSHA's targeting of that good employer, even in a high hazard industry, would likely effectuate any marked improvement in workers safety and health.

I think further, given OSHA's limited resources, that this provides a much better targeting mechanism for OSHA. I think it comports also with the findings of the President's Interagency Task Force on Workplace Safety and Health, which observed that in both your high and low hazard industries, you will find good and less-than-good employers.

Senator **Schweiker**. Dr. Bingham said that to give any employer an exemption from some inspections and some penalties would make it much less likely that the employer would try to provide a safe workplace. She also said it would be like barring policemen from going into lower crime neighborhoods.

What's your reaction to that comment?

Mr. **Gallagher**. My reaction, Senator, is that OSHA is not a policeman, nor are we criminals. I believe the intent of the act of 1970 was to achieve abatement through cooperative efforts with manufacturers, workers, and OSHA. I feel that we should move toward more incentives for voluntary compliance for improving worker safety and not rely so heavily on penalties as we have in the past 9 years.

My own opinion is that if we were recognized for providing and constantly improving a safe work environment for our employees, this would create an environment condusive to constant improvement in our performance. We certainly wouldn't let down our guard and act in a less safe manner.

Mr. **Lunnie**. I think NAM in its prepared statement, which I believe is representative of our membership, feels very strongly that a mechanism which induces compliance through cooperation, through encouragement, through incentives, is much more likely in the long run to achieve the act's goals—namely, safety and health in the workplace.

I think it is false to assume that simply because an employer might be exempted from general schedule, routine safety inspections, and also some of those inspections which arise out of employee complaints, that such an employer would be exempt from his or her duties under the act.

First and most importantly, regardless of their exempt status, employers are still required to fulfill all obligations and duties under the Occupational Safety and Health Act; namely, to comply with the standards and to provide their employees with safe and healthful working conditions.

Furthermore, these employers are not exempt from health inspections. For some reason, the issue of health continues to come up in discussions on this bill, when the bill addresses only safety. In addition, complaint inspections that are very clearly provided for in your bill, specifically, those which arise out of accidents, and those which allege imminent danger or serious conditions. In conclusion, although an employer might achieve an exempt status, they are not exempt from the duties under the law.

Mr. **Railton**. I think one of the things that at least NAM focused upon during the recent oversight hearings, Senator, was the punitive nature of OSHA's approach.

In your question I heard implicit in Dr. Bingham's statement that same approach—the cop on the scene. We have heard that through the testimony of the opponents of your bill.

Quite frankly, I think what we need here is a reemphasis, which I think your bill is directed toward, the first enumerated objection under section 2(b)(1) of the act, which means that achieving safe and healthful workplaces is to be the mutual obligation of the employer and the employee, and that the Congress, when it passed the bill in 1970, indicated what we want to do is foster that mutuality of cooperation to improve existing programs in the workplace and to create new ones. I think your bill, by providing incentives, fosters that very objective.

But the thing that has gone awry here, as we addressed during the oversight hearings, is the fact that in the labor law legislation it's the usual thing to try and obtain voluntary compliance, because as you noted, Senator, there just simply are not enough Federal compliance personnel to go around the entire Nation. That's not what OSHA has done. Rather, it has taken the carrot out of the carrot-and-stick approach, dropped that carrot and has gone strictly on a punitive thing.

Dr. Bingham emphasized the fact in her statement, by characterizing or analogizing this situation to the motor vehicle law enforcement situation. I think that's entirely inappropriate.

Mr. **Blasier**. Senator, if I may, I think implicit in Dr. Bingham's statement may be perhaps an overstatement as to the deterrent effect of the ever-present possibility of an OSHA inspection. Given the rather significant number of inspections that turn up no violations, I really have some questions about the legitimacy of that assumption.

Also, there are any number of other motiviations operating in the workplace itself that would trigger an employer's attention to safety and action with regard to any such problems.

Senator **Schweiker**. Thank you all very much for being here. We appreciate your patience. Our hearings are running late, and we thank you for participating.

Our next witness is Mr. Mel Glasser, director of social security of the United Automobile Workers.

STATEMENT OF MELVIN A. GLASSER, DIRECTOR, UNITED AUTOMOBILE WORKERS SOCIAL SECURITY DEPARTMENT, ACCOMPANIED BY DR. FRANKLIN MIRER, ASSISTANT DIRECTOR

Mr. **Glasser**. Senator Schweiker and members of the committee, I shall speak briefly about the highlights of our testimony.

Senator **Schweiker**. We will put the testimony in the record.

Mr. **Glasser**. I would appreciate the entire testimony be inserted in the record and I am, of course, prepared to answer questions on any and all aspects of what's in the record.

I hope, Senator, that there will be careful attention to what I am going to say. I am directly responding to the allegations we have just heard from the National Association of Manufacturers and from others who have testified. It is based on direct evidence in the plants and direct evidence in many of the major industries represented in the membership of the National Association of Manufacturers.

I am the director of the social security department of the United Automobile Workers. I am accompanied by Dr. Franklin Mirer, a toxicologist and industrial hygienist who is assistant director of the department.

The United Automobile Workers is opposed to S. 2153 in any form. We believe that adoption of this bill in whole or in part will increase the hazards to which workers are exposed.

The bill was introduced to supposedly "improve" the Occupational Safety and Health Act. There are no improvements in this bill.

I base these remarks on the experience of 1.5 million members of the UAW, in roughly 3,000 workplaces, clear across the country where they are employed.

The chief arguments against OSHA and the regulatory approach mandated in the act is that OSHA hasn't done much to eliminate hazards or reduce injuries. We just heard that from the previous witness.

The UAW experience clearly contradicts this argument. In our experience, OSHA has been effective; compliance with the standards and the regulatory approach of the agency has led to safer plants. Many serious health and safety hazards remain. Abating these will require a strong and continuing Government commitment, for lives are at stake.

1. The injury rate for UAW members in large companies has dropped dramatically since the advent of OSHA. We calculate that more than 79,000 injuries were prevented in auto plants in 1979 alone. These workers were spared pain, suffering, and disability by safety programs which developed since OSHA became law.

Mr. Chairman, in the General Motors Corp. as a whole, the injury rate dropped by 66 percent from 1973 to 1979. Is this no measurable change to which the NAM alluded? In the Chrysler Corp., the incidence rate dropped by 82 percent over the same period. For Ford workers, the drop was over 45 percent over a shorter period, from 1976 to 1979. These are not generalizations, Mr. Chairman. They are supportable facts.

Many hazardous exposures to chemicals such as asbestos, lead, silica, have been abated or greatly reduced. Hundreds of visible health and safety problems have been resolved.

Many difficult problems remain, both in the safety area and the health area. In-plant deaths still occur. Our members still suffer injuries at an unacceptable rate, especially compared to white-collar workers. Hazardous chemical exposures remain, and the problems are worse in smaller plants. We feel we are on our way to gaining further improvements, and that progress will be set back if regulation and enforcement are cut back as this bill will do.

The successes of the seventies were in part spurred by the OSHA law. Major contracts established new union and workers' rights, and trained health and safety representatives, and a joint safety committee became patterns. Bargaining at the plant level won improvements in conditions. Partly under the threat of OSHA inspections, management agreed to many of the major joint health and safety programs. All these led to improvements.

OSHA alone would not have done it. However, the UAW and its members most definitely do not want to experiment whether we can maintain the program without OSHA, or make further progress without Government help.

2. After 7 years of OSHA enforcement, the most serious job safety hazards for UAW members occur in operations where OSHA has no specific regulations. Nothing about this has been said in these hearings. Where there are regulations, these hazards have been abated to a much greater extent.

Most on-the-job deaths of our members occur in operations which are poorly regulated by OSHA, and would be more so by this act, except through the general duty clause. The skilled trades and other workers in maintenance-type tasks suffer the greatest risk. The leading causes of these tragedies are the failure of the companies to implement programs for lockout of power to machinery prior to repair or cleaning, and procedures for entry into confined spaces. Thirty-five UAW members have been killed in the last 10 years in spite of corporate safety policies and recommended procedures for these operations.

Recommendations are not enough. Plant management usually wants to know what it has to do, not what it ought to do, but what it has to do.

About half the reported job fatalities to our members are suffered by small groups of workers in operations where there are limited safety standards. We note that preventive inspections aimed at these high hazard jobs will be greatly diminished if this bill passes. It would be a tragedy.

3. It is claimed that this bill has been proposed to foster cooperation between labor, management, and government. Its actual effect will be to destroy cooperative relationships which have grown up since OSHA became law.

Evidence. In 1973, after the passage of OSHA, our union was able to negotiate landmark contractual agreements with the auto industry on job safety. We had been trying for almost 20 years prior to this to get such agreement. This breakthrough was possible to a large extent because the employers feared Government enforcement for the first time.

The companies were willing to start cooperative programs on safety with the union as an alternative to OSHA inspections. The timing is important. In the very first round of negotiations, after 20 years of failing, we were able to get contractual agreements, because OSHA was now law.

We have had both good and bad relationships on safety matters with many companies, both before and after OSHA. We fear that if the threat of OSHA enforcement is removed, as this bill will do, the cooperative programs we have developed with the companies will suffer.

4. S. 2153 will eliminate OSHA enforcement in large and inherently hazardous operations. The criteria for the exemption of plants from OSHA inspections would reduce enforcement in large, inherently hazardous plants, such as foundries, forges, and stamping plants.

We have reviewed the 1979 injury statistics for the auto industry in light of the Schweiker bill, to see the effect of the bill on the availability of OSHA enforcement to our members. This is the automobile industry represented here by the NAM.

As many as 88 percent of the 116 reporting units in General Motors would be exempted, including 24 of 25 Chevrolet Division plants, 13 of 19 General Motors AD plants, all of the Central Foundry Division, all of Fisher Body Division, including stamping, all of Buick, Pontiac, and Oldsmobile complexes.

For Ford Motor Co., 56 of 61 locations would be exempt. The data for Chrysler finds 77 percent of the plants would be exempt. And lest we stay only with the automobile industry, International Harvester Corp.'s reports show that all 13 of their manufacturing operations, including foundries, would be exempt.

5. Averaging lost workday injury rates over individual plants is an unreliable method for directing enforcement. The injury rate the bill uses to consider a plant "safe," so called, is so high that workers in such a plant would have a 50-50 chance of suffering a serious injury over a working lifetime.

Whether an injury causes days away from work depends as much on the company finding light duty jobs or asking workers on crutches to report to the plant than on the severity of the injury. And we have hundreds of such illustrations.

The method ignores high hazard jobs within larger operations. The skilled trades, identified as being at highest risk to the most serious safety hazards, are less than one-fifth of the work force.

Many plants contain both high hazard and low hazard operations under one roof. With a whitewash brush of this bill, they would both be exempt.

Finally, injury statistics are just not reliably reported. Injury rates are useful to determine progress from year to year in one plant or in one industry, but they cannot be used as criteria for exempting plants from safety inspections.

Our point, the list-making asked for by S. 2153, would be an administrative absurdity. The bill creates massive paperwork, and in another hearing somewhere we will hear about cutting down on paperwork from those committee members who are in favor of monumental paperwork under this bill.

With over 4 million workplaces potentially appearing on the list, we expect the entire effort would collapse of its own weight. Either the agency would limit all inspections, or it would adopt a policy of inspect first and ask questions later.

The safety committee and consultant provisions of the bill are so weak that they actually penalize workers for having a safety committee. This is an antisafety committee bill. They allow employers to set up ineffective paper programs which will confer freedom from penalties.

The workers on these committees are not provided with training, allowed to make regular plant inspections, given the right to meet on company time, given access to data or any of the other elements proven to be needed to make joint committees work. Coupled with the absence of a requirement that the employer follow his safety committee's or consultant's advice, these provisions are a mockery of the hard-won cooperative programs which we have established with employers.

The restrictions on complaint investigations cut the heart out of the act, removing the pressure for voluntary compliance.

Under S. 2153, OSHA will not be able to schedule an inspection in an exempted workplace when it receives a worker's complaint. The proposed procedures mean delay, an exchange of letters, telephone calls—advance notice.

At present, when a worker points out a hazard to management, the company knows that refusal to abate the violations may lead to inspection and fines. If this bill passes, the employer needn't respond until OSHA calls. The employer knows that he may be able to talk OSHA out of the inspection, and only after failing that will have to change conditions.

If this weren't enough, inspectors are barred from citing violations which are not within the normal scope of their investigation. This puts blinders on inspectors, forbidding action even if they trip over hazards on the way to the exact site of the complaint. Is this what this committee is after?

Our conclusion: We believe S. 2153 would have no effect but to allow employers to delay and evade the correction of safety hazards. I can only respectfully suggest that those who find improvements for workplace safety in this bill have been misguided on its impact.

There continue to be problems in the effective administration of OSHA, problems largely inherited from previous administrations. We are, however, encouraged that under Dr. Bingham programs are being adopted to address these problems; better administration in the regional offices; better training of compliance officers; more sensible directives concerning citations, revision of safety standards, et cetera, et cetera.

S. 2153 will undermine programs unions and the Government have built to protect the lives—with the cooperation of employers—to protect the lives, limbs, and health of workers. We urge you to reject it.

Senator RIEGLE [presiding]. Let me say, Mr. Glasser, how much we appreciate your statement. It's a strong and very compelling statement. You certainly speak for a major part of a very significant group of working men and women in the United States. So I think your testimony carries considerable weight.

[The prepared statement of Mr. Glasser follows:]

April 17, 1980
Washington, D. C.

Testimony on S. 2153

THE OSHA IMPROVEMENTS ACT OF 1980

by

Melvin A. Glasser, Director
Social Security Department
International Union, UAW

before

Committee on Health and Human Resources
United States Senate

In Behalf Of:

International Union, United Automobile,
Aerospace and Agricultural Implement
Workers of America, UAW

I am Melvin A. Glasser, Director of the UAW Social Security Department. I am accompanied by Dr. Franklin Mirer, a toxicologist and industrial hygienist who is Assistant Director of the Department.

The UAW is opposed to S. 2153 in any form. We believe that adoption of this bill in whole or in part will increase the hazards to which workers are exposed, through reducing present protection.

The bill was introduced to supposedly "improve" the Occupational Safety and Health Act. There are no improvements in this bill -- there are only concessions to those employers which place profits before safety. There is only a retreat from our national commitment to workplace safety and health.

I base these remarks on the experience of one and one-half million members of the UAW in the roughly 3000 workplaces where they are employed. In some of these locations we know there are many severe hazards; in others the environment is relatively safe. Some of the companies which own these plants are very interested in providing safe and healthy workplaces, as required by law. They cooperate with the Union to remove hazards; other companies, in plain language, just don't care.

Since the Act was passed in 1970, we have heard a number of arguments against OSHA and the regulatory approach mandated in the Act. These arguments might be summarized as:

- OSHA hasn't done much to eliminate hazards or reduce injuries;
- Compliance with OSHA standards is unrelated to preventing injuries;
- OSHA inspections, penalties and compliance with standards are a great burden on employers with safe plants; and
- The enforcement-minded attitude of the agency has led to widespread resistance by employers and a willful failure to abate real hazards.

The UAW experience contradicts each argument. In our experience, OSHA has been effective -- compliance with the standards and the regulatory approach of the agency has led to safer plants. Many serious health and safety hazards remain. Abating these will require a strong and continuing government commitment.

I. The injury rate for UAW members in large companies has dropped dramatically since the advent of OSHA.

We calculate that more than 79,000 injuries were prevented in auto plants in 1979 alone. These workers were spared pain, suffering and disability by safety programs which grew up since the OSHA law.

This figure was calculated from the dramatic drop in both lost workday and non-lost workday injuries over the period when OSHA was in effect.

In the General Motors Corporation as a whole, the injury rate dropped by 66% from 1973 to 1979. This means that over 40,000 injuries were prevented in 1979, injuries which would have occurred had the conditions of 1973 been allowed to persist. In Chrysler Corporation, the incidence rate dropped by 82% over the same period. As a result, 27,000 Chrysler workers who would have been hurt had the 1973 conditions been allowed to persist, were spared injury in 1979. For Ford workers the drop was 45% over the shorter period of 1976 to 1979, equivalent to about 12,000 injuries which didn't happen in 1979.

The national injury statistics which are quoted by some to prove that OSHA hasn't worked are based on mail questionnaires which are filled out by employers and tabulated by the Bureau of Labor Statistics. The UAW uses plant OSHA 200 Forms, essentially the same data base used by the BLS, except that our data is verified and accurate.

These statistics confirm the qualitative impression that conditions have improved.

Many hazardous exposures to chemicals such as asbestos, lead, silica, have been abated or greatly reduced. Hundreds of visible health and safety problems have been resolved.

Many difficult problems remain, both in the safety area and the health area. In-plant deaths still occur, especially among the Skilled Trades, where specification standards are sorely needed. UAW members still suffer injuries at an unacceptable rate, especially compared to executives, professionals, white-collar jobs and light industries. Many hazardous chemical exposures remain, and problems are worse in smaller plants. We feel we are on our way to gaining further improvements, and that progress will be set back if regulation and enforcement are cut back.

The successes of the 70's were in part spurred by the OSHA law, the standards, inspections, citations and the threat of inspections. Major contracts established new Union and workers' rights, including access to health data, accident reports, and safety procedures. A trained Health and Safety Representative and a Joint Safety Committee became patterns. Bargaining at the plant level won improvements in conditions. Health and safety issues were raised in a grievance procedure backed up by right to strike. Partly under the threat of OSHA inspections, management agreed to many major joint health and safety programs.

All these led to improvements. OSHA alone would not have done it. However, the UAW and its members most definitely do not want to experiment whether we can maintain the program without OSHA, or make further progress without government help.

2. After seven years of OSHA enforcement, the most serious job safety hazards for UAW members occur in operations where OSHA has

no specific regulations; where there are regulations these hazards have been abated to a much greater extent. My previous remarks addressed successes in safety since the OSHA law went into effect. Now let me consider the worst failures of our national safety effort, to suggest that these conditions persist because they have evaded regulation.

Most on-the-job deaths of UAW members occur in operations which are poorly regulated by OSHA, except through the General Duty Clause. The Skilled Trades and other workers in maintenance-type tasks suffer the greatest risk. The leading causes of these tragedies are the failure of the companies to implement programs for lock-out of power to machinery prior to repair or cleaning, and procedures for entry into confined spaces. Thirty-five UAW members have been killed in the last 10 years in spite of corporate safety policies and recommended procedures for these operations. Recommendations are not enough: plant management usually wants to know what it has to do, not what it ought to do. The UAW petitioned OSHA for an emergency temporary standard for lock-out, and has pressed for standards for entry into confined spaces.

Another failure of prevention concerns work with molten metal in foundries, operations in which 9 UAW members have been killed since 1970. Any unsafe condition in a melt area can pose an immediate danger to life, even though few meet the apparent definition of imminent danger. Some hazards are covered by OSHA's General Industry Standards, but there are no specific standards for the extremely hazardous operation. Our year-by-year tragic experience in foundries proves the need for specific strict standards, strictly enforced.

About half the reported job fatalities to our members are suffered by small groups of workers in operations where there are limited safety standards. Where there are enforced standards, they seem to work. Perhaps one reason for the complaint that regulations are unnecessary is that where standards are enforced there are fewer accidents involving the regulated hazards and the need for these safeguards is no longer as apparent.

We note that preventive inspections aimed at these high hazard jobs will be greatly diminished should S. 2153 pass.

3. It is claimed that S. 2153 has been proposed to foster cooperation between labor, management, and government. Its actual effect will be to destroy cooperative mechanisms which have grown up since the OSHA law.

The OSHA law has worked indirectly by fostering cooperation between the UAW and Management and creating an environment which allowed other forces to have an impact on safety. In 1973, after the passage of OSHA, the UAW was able to negotiate landmark contractual agreements with the auto industry on job safety. This breakthrough was possible to a large extent because the employers feared government enforcement for the first time. The companies were willing to start cooperative programs on safety with the Union as an alternative to OSHA inspections. To be completely clear on this, the UAW has agreed with the employers that as a general rule, that we will raise safety issues internally first and call for OSHA inspections only if Management does not abate hazards. We encourage our members to use the Union-Management procedures before filing complaints. (We note that OSHA's own policy is to encourage workers to raise issues with Management first, and this policy is contained in the agency's publications.)

Thus, OSHA had an impact in plants before an OSHA inspector set foot inside, by creating a foundation on which the UAW program could operate effectively. The decrease in the injury rate which we have documented today is due to the combination of an active Union program with OSHA legislation.

We have had both good and bad relationships on safety matters with many companies, both before and after OSHA. We fear that if the threat of OSHA enforcement is removed, the cooperative programs we have developed with the companies will suffer greatly.

In short, the UAW is convinced that adoption of S. 2153 and the subsequent drastic reduction of active OSHA enforcement from most plants will not increase cooperation between the Union and Management, it will decrease the cooperation.

At this point, I would like to turn to the proposed legislation itself. This bill would not work, even in the terms of the stated goals of the sponsors.

4. S. 2153 will eliminate OSHA enforcement in large, inherently hazardous operations. The sponsors of S. 2153 wanted to eliminate OSHA coverage of small, low hazard operations. However, the criteria for the exemption of plants from OSHA inspections would reduce enforcement in large, inherently hazardous plants, such as foundries, forges and stamping plants.

We have reviewed the 1979 injury statistics for the auto companies in light of the Schweiker Bill to see the effect of the bill on the availability of OSHA enforcement to our members.

As many as 88% of 116 reporting units in General Motors would be exempted, including 24/25 Chevrolet Division plants, 13/19 GMAD plants, all of Central Foundry Division, all of Fisher Body Division (including stamping), all of the multi-plant Buick, Pontiac and Oldsmobile complexes.

For Ford Motor Company, 56/61 locations would be exempt, including 11/15 assembly plants, 7/9 stamping plants, all the engine and chassis plants and foundries.

The data for Chrysler finds 77% of the plants below the cut-off, including 5/6 stamping plants, half the four casting plants and all foundries and engine plants.

International Harvester's reports show that all 13 of their manufacturing operations, including foundries, would be exempt.

These statistics are derived from the OSHA 200 injury summary listing injuries with days away from work. This is required to be posted at each plant.

Each reporting location has a Safety Committee, and each company has consultants. Therefore, the immediate effect of the passage of this bill would be to eliminate scheduled inspections, to delay and straightjacket complaint inspections, and to abolish penalties for serious violations in these 202 plants with nearly 700,000 hourly workers.

Let's choose one plant of those 202. The Chrysler Indianapolis Foundry has a lost time injury rate of which qualifies for limitation of OSHA safety activity. In the recent past, workers were killed in cupola bottom drops on two separate occasions. OSHA inspected, issued citations and collected penalties. Routine safety inspections cited dozens of violations. The plant was also cited for overexposure to lung damaging silica dust and noise, and threatened with citations for failure to abate improve conditions. Both health and safety conditions have improved, but disabling injuries still occur, and dangerous conditions still exist. Conditions are not good enough. The release of plant management from the threat of preventive inspections and thorough unannounced inspections in response to workers' complaints not only threatens to stop progress, but we expect also would cause a rapid slide back to the previous situation. We expect this scenario would be repeated in the other 201 major plants exempted from safety enforcement.

The Local and International Union's hope in that plant and others was, and is, to resolve safety issues in cooperative discussions, and failing that, through the internal process of the grievance procedure and contract negotiations. However, in the present economic climate, money for improvements of the working environment is not forthcoming, and the strike threat in the whole auto industry is empty.

5. Averaging lost workday injury rates over individual plants is an unreliable method for directing enforcement. First, the injury rate the bill uses to consider a plant "safe" is so high that workers in such a plant would have a 50-50 chance of suffering a serious injury over a working lifetime.

Second, whether an injury causes days away from work depends as much on the company finding light duty jobs or asking workers on crutches to report to the plant than on the severity of the injury.

Third, the method ignores high hazard jobs within larger operations. The Skilled Trades, identified as being at highest risk to the most serious safety hazards, are less than 1/5 of the work force. Other minority occupations are at high risk, such as clean-up personnel and materials handlers. Such jobs exist in nearly every potentially low injury rate plant.

Fourth, many plants contain both high hazard and low hazard operations under one roof. It is common, for example, to have a department full of high hazard stamping presses located in an otherwise low hazard assembly plant. Sometimes even small forges and foundries are included in the midst of manufacturing operations which are otherwise considered safe. By almost anyone's viewpoint, these operations need firm regulation, but under this bill they would likely be exempted.

Finally, injury statistics are just not reliably reported, certainly not well enough to make life or death decisions such as whether an inspector can go directly to a plant in response to a worker's complaint or must first call the plant manager. This opinion is based on detailed analysis of OSHA 200 Forms for several hundred plants for seven years. If the highly sophisticated major corporations fail this test, there is no prospect of getting consistency among all the companies in the United States with their variations in size, operation, and personnel.

Injury rates are useful to determine progress from year to year in one plant or in one industry. But, they cannot be used as criteria for exempting plants from safety inspections.

6. The list-making asked for by S. 2153 would be an administrative absurdity. The bill creates massive paperwork. The claim that it uses an existing injury reporting system is incorrect. It asks employers to report many more injuries to State workers' compensation agencies

than they are required to under State laws, and asks these State agencies to transmit a list of all reporting employers to OSHA, which they also don't now do. Most large employers would also have to file an affidavit with OSHA to obtain exemption. Then, when a complaint was received the agency would have to consult the first list to see if a plant in question were there, then the second to see whether it weren't there. With over four million workplaces potentially appearing on the two lists, we expect that the entire effort would collapse of its own weight. Either the agency would limit all inspections, or it would adopt a policy of inspect first and ask questions later.

7. The Safety Committee and consultant provisions in the bill are so weak that they actually penalize workers for having a Safety Committee. They allow employers to set up ineffective paper programs which will confer freedom from penalties. The workers on these committees are not provided with training, allowed to make regular plant inspections, given the right to meet on company time, given access to data or any of the other elements proven to be needed to make joint committees work. Coupled with the absence of a requirement that the employer follow his Safety Committee's or consultant's advice, these provisions are a mockery of the hard won cooperative programs which we have established with employers.

8. The restrictions on complaint investigations cut the heart out of the Act, removing the pressure for voluntary compliance. Current OSHA priorities emphasize visits to high-hazard worksites. In a few cases where OSHA expects no hazard, complaints are screened or given lower priority. But, the individual worker who feels endangered still has the right to get an inspection. This is one of the fundamental rights recognized by the OSHA law.

Under S. 2153, OSHA will not be able to schedule an inspection in an exempted workplace when it receives a worker's complaint. The proposed procedures mean delay, an exchange of letters, telephone calls -- advance notice. It automatically gives more weight to the employer's word than the worker's. Only after these steps can the inspector enter the plant.

At present, when a worker points out a hazard to Management, the company knows that refusal to abate the violation may lead to inspection and fines. If this bill passes, the employer needn't respond until OSHA calls. The employer knows that he may be able to talk OSHA out of the inspection, and only failing that will have to change conditions. In the meantime, the employer can pressure the worker or the Union to withdraw the complaint.

If this weren't enough, inspectors are barred from citing violations which are not within the normal scope of their investigation.

This puts blinders on inspectors, forbidding action even if they trip over hazards on the way to the exact site of the complaint.

Not only would this practice be professionally unethical for the inspectors involved, but these provisions would provide fertile ground for endless litigation. Employers would have their lawyers challenge the manner in which OSHA discovered the hazard, rather than correct the hazard.

9. Conclusions.

To summarize, we believe S. 2153 would have no effect but to allow employers to delay and evade the correction of safety hazards. I can only respectfully suggest that those who find improvements for workplace safety in this bill have been misguided on its impact.

This bill is a blatant take-away of workers' rights, part of an overall campaign by business and right-wing organizations to roll back the gains which workers have made in a number of areas in recent years, such as Unemployment and Workers' Compensation, and social programs. The principle difference this time is that the stakes are not workers' incomes but their lives and health.

In presenting these views we are mindful of the fact that there continue to be problems in the effective administration of OSHA, problems largely inherited from previous administrations. We are, however, encouraged that under Dr. Eula Bingham programs are being adopted to address these problems: better administration in the Regional and

Area Offices; better training of compliance officers; more sensible directives concerning citations, revision of safety standards; more emphasis on health.

Just at a time when the agency is beginning to have good impact, you are considering a proposal to cut the heart out of the Act.

The record of American companies racing to the courthouse to block every new standard and contest virtually every OSHA citation demonstrates a short-sighted disregard for the health of their employees. If these companies would spend as much time and effort cleaning up their plants as they do fighting OSHA, the injury and illness rates in the plants would be much better.

S. 2153 will undermine programs unions and the government have built to protect the lives, limbs, and health of workers. We urge you to reject it.

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Senator **Reigle**. The committee may have some questions that it will want to have you respond to for the record. Senator Schweiker, who has left the room, apparently does not have any questions that he wants to pose today. Maybe that's because the presentation is so strong that there are no questions.

Mr. **Glasser**. I appreciate your comments, Senator Riegle, and I am delighted to see you here, as my own Senator, who has an interest, obviously, in our State.

I think in terms of the specifics, I did not include them in the testimony, but when one looks at the drop in the accident rate on a State-by-State basis, we find that they range in the neighborhood in recent years of 10 to 12 percent.

In the State of Michigan, the drop is over 44 percent. The principal reason for that is obviously the presence of the UAW and the ability of the UAW to capitalize on the OSHA legislation. With one without the other, it would not be possible. But on a State basis one can see that, in fact, OSHA is an extremely beneficial law, and the effect of this bill would be to gut it.

Senator **Riegle**. You make a very important point.

Senator Schweiker, do you have any questions for this witness?

Senator **Schweiker**. Maybe a couple.

What is your opinion of labor-management safety committees as an instrument to help workers' safety, Mr. Glasser?

Mr. **Glasser**. In my testimony, Senator Schweiker, I indicated that our union has been in a preeminent position in developing such committees, that it was not possible to develop them until the advent of the OSHA law. The presence of OSHA and the possibility of inspections greatly enhanced that.

The effect of this bill that you are sponsoring would be to undermine it, because in the absence of time off to conduct the inspections, in the absence of penalties if the recommendations are not followed, and in the absence of certain other factors, the effect of your bill would be to take away from us what we have gained since 1973.

Senator **Schweiker**. Of course, my bill specifically provides for labor-management safety committees.

Mr. **Glasser**. Yes, and I indicated the way in which it would in fact, not provide for more safety and health committees, but to take them away. I refer to page 12 of my statement, in which I said in your bill the way in which the safety committee is structured would allow employers to set up, in effect, a paper program which will confer freedom from penalties. The workers on these committees are not provided with training; they are not allowed to make regular plant inspections; they are not given the right to meet on company time; they are not given access to data or any other elements proven to be needed to make joint committees work. Couple this with the fact that your bill does not require an employer to follow the safety committee's or consultant's advice.

I said in this testimony on behalf of our union that they're a mockery and they will, in fact, undermine the hundreds of effective working committees that we have, where we now have these rights, and they no longer will be required.

Senator **Schweiker**. Well, it's an interesting analysis, and I guess this shows the polarization problem between labor and management in this area. Just a day or two ago management criticized my labor-management safety committee because it would give the labor members an absolute veto over the continuation of a committee. They hit me because the leverage would be with the workers who would refuse to serve on a committee if management didn't do so and so. And they argued that workers would have more power than they ever had before.

You're perfectly entitled to your opinion, but I think this is the trouble in writing legislation in this area. Immediately each side hunches up and picks out that which they're sure is going to be the club for the other guy, and wave the red flag.

I think it's perfectly indicative of what trouble there is to reform or change a law, when both sides perceive it as giving the other guy a club. You perceive it as giving the other guy a club, and they perceive it as giving the other guy a club. I really think this is the problem.

Mr. **Glasser**. Senator Schweiker, there are two comments I would make on that. In the first place, I seriously doubt whether the employers with whom we deal are the authors of the statement that you quote. Our statement comes from experience.

Senator **Schweiker**. I didn't say they were, Mr. Glasser. Let's keep the record straight: I didn't say they were.

Mr. **Glasser**. I know you didn't. I want the record to indicate that our experience with employers has not been that to which you attribute comments from other employers.

The second thing I would like to say is this: In the automobile industry today, we face an extremely serious problem with some health hazards. We have been using our joint safety and health committees in a wholly cooperative integrated way jointly to address this problem. We have been using them, because they are well established; they have understood rights and relationships; and we are working wholly in accord with industry and they with us on this. So that this confrontation which you talk about does not exist in our experience.

Senator **Schweiker**. Well, I would concur with that. I think UAW does have good labor-management committees.

And, of course, the reason I put it in the bill was to foster committees and encourage them in industry and labor groups that don't have them. And I got attacked immediately from the management side for two reasons, one I already mentioned—because nobody can participate in this program if the labor guys refuse to serve, which would in fact be an absolute veto over what their employer safety program is.

The other criticism I got from employers was I was setting up potential labor groups in nonunion shops.

So it's sort of interesting that you shoot at that from one side and I get shot at from the other side because it would be a club.

Mr. **Glasser**. We would not shoot it down if you put in the protections to which I alluded.

Senator **Schweiker**. Well, I think it does point out the polarization problem and how everybody perceives what the advantage is from their particular point of view, and whether it's a club or not a club over the other side. And, unfortunately, that obscures what I think is the goal, which is a safe place to work.

Senator **Riegle**. Would the Senator yield at that point?

Senator **Schweiker**. Yes.

Senator **Riegle**. And I certainly acknowledge the fact that my friend from Pennsylvania has devoted a lot of time to this particular issue, certainly as these witnesses at the table have and others who are testifying today. But it seems to me that the argument that is made is that if you start to dismantle any of the existing machinery, you take away the very set of realities that make the labor-management committees work. The reason that they have been productive, as I have heard this witness speak, in the case of the auto industry and the United Auto Workers, is because there is an incentive to make them work; and the incentive is that there are other procedures that will come into play in the event that these things aren't worked out on a cooperative basis.

And it seems to me the point still stands that if you take away that incentive to work out an answer that we are right back where we started before we had this positive set of incentives.

Senator **Schweiker**. Well, there is nothing in my bill that would dismantle the present labor-management safety committees.

Senator **Riegle**. No, it's not dismantling them; it is to create——

Senator **Schweiker**. I am trying to create them, not dismantle them.

Senator **Riegle**. Well, let me just try again.

Senator **Schweiker**. I am providing for them, and particularly in the shops that don't have them.

Senator **Riegle**. No, but the point is not to have them by themselves; the point is to have them and have them in a form and in a manner in which they can be effective. And what I have heard this witness say is that the concept can work as long as the law is there backing it up. And that is what in the opinion of this witness has allowed that committee approach to be effective—not just to exist, but to be effective

And I am also hearing the concern that if you take away the process of law which is really what has made the committee work effectively—if you take that away, you will have the committee, but no guarantee that it will be effective.

That's the problem, as I hear it.

Senator **Schweiker**. I do not believe at all we are taking away the process of law that has made them work effectively.

Mr. **Glasser**. Well, you take it away, Senator Schweiker, when the threat of OSHA inspections for serious violations—and I gave you the numbers of the plants that would be exempt under this—you remove that and you provide for a safety committee without authority or training or time off to replace it—you in fact remove the incentive to continue the very good advances we have made in safety committees. Our history is replete with illustrations of this.

Senator **Schweiker**. Well, you keep making these statements, without time off, without—my bill does nothing with that, doesn't even touch that area. That's a labor-management negotiation. You keep throwing up a smokescreen. It has absolutely nothing to do with time off, has absolutely nothing to do with training—that's up to the union and the employer, or the workers and the employer. It has absolutely nothing to do with the bill.

Mr. **Glasser**. May I ask you a question, sir?

Senator **Schweiker**. Again, you wave a red flag. It isn't a matter of reason or logic; it's just a matter of it's got to be bad because you say the other guy gets a club.

Mr. **Glasser**. Are you saying that it is not within the purview of this committee and of proposed legislation, when one requires the existence of safety and safety committees, that one could also require that those committees could meet on company time, that they could have access to data, as in fact is present in hundreds of laws now on the books, and that there would be other requirements that could be included in the law?

Senator **Schweiker**. Oh, you certainly could, and I haven't said I am opposed to it. But for you to come in here and say that I am tearing down all of your things that are doing that right now is absolutely wrong.

Mr. **Glasser**. No; I don't think it is, sir.

Senator **Schweiker**. And that's my argument. You guys come in with all these charges that are wild, are off the wall, have nothing to do with my bill. I don't touch that at all. I don't quarrel with that.

Mr. **Glasser**. Our quarrel is that indeed you are not dealing with it, and by not dealing with it you are indeed harming the present relationships—make no mistake about it.

Senator **Schweiker**. What I am attempting to do is to set up labor-management safety committees in cases where they don't exist. You admit they are a good thing, you admit they work well for the UAW. So do I.

Mr. **Glasser**. I admit, sir, that they work well for the UAW and they do for other unions when properly structured, when they have access to data, when the people who are on them have the opportunity for training, and when the law gives them the back-up of if they don't function there will be penalties and inspections.

Those things your bill takes away from us.

Senator **Schweiker**. We don't take any of those things away from anybody. You show me the section of the bill that takes those things away from people. You make these wild charges.

Mr. **Glasser**. Dr. Mirer?

Dr. **Mirer**. We just quoted statistics to you that show somewhere upwards of 80 percent of our plants would qualify for low injury rates under the present circumstances, without any juggling of figures. We have safety committees in every one of those plants. You confront the local union now with a choice: If you maintain your safety committee, there will be no penalties for serious safety violations—you have a choice between penalties for serious safety violations and maintaining your safety committee. And a lot of our local unions would look pretty carefully at that choice. And some of them may decide that they would rather have the——

Senator **Schweiker**. Under my proposal, if the safety committee makes a recommendation and the employer ignores it, the violation will be willful. And penalties for willful violations are preserved. You keep coming back with these false charges. The safety committee has the absolute power to make a recommendation; if the employer ignores it, it's willful. And we don't exempt anybody from penalties for willful or repeat violations.

Mr. **Glasser**. Does your committee requirement require agreement between the labor and the management representatives on that committee?

Senator **Schweiker**. That's the point I was trying to make earlier when you weren't listening to me. It gives them the absolute power to walk out on that committee and say, no dice. That is their leverage. And that is exactly what business was hitting me about 2 days ago.

Mr. **Glasser**. Senator, let me take it again, where life is. These safety——

Senator **Schweiker**. I am just trying to tell you where my bill is, because there doesn't seem to be an understanding about where my bill is.

Mr. **Glasser**. Well, I think we read your bill, but we also read what's happening in the plants—and I wish I could register what's happening in the plants. Frequently there are disagreements between the labor and management representatives on the committee. The agreement is fostered, Senator, when there is an opportunity to say, If we do not agree, we will blow the whistle; we will get the police in—term you don't like—we will get OSHA in.

When these committees do not have this backing, which is the point Senator Riegle was making—when they do not have this backing, the disagreement continues; there is no recommendation from the committee, because they are split—that's the way it works in the local union, and that's the way it works in a local plant.

So there is no recommendation.

Senator **Schweiker**. All they have to do under my bill is just say that they have had it, and resign—and that triggers the whole penalty mechanism back to present law. Now, you know, I can't say it again too often—we can argue this point back and forth, but that's the way it works. It's my bill, not your bill. I, as an author of the bill, am entitled to give you my legislative intent, and that's what I am trying to do. And, sure, you can shoot it down at every step. But it is my bill and that is my intent. When the bill is passed, they go back to the intent and the purpose and the expressed objectives of the bill in enforcing it.

Dr. **Mirer**. Senator Schweiker, I believe you stated our exact point. We are given the choice of abandoning the safety committee and going back to enforcement alone, or we can maintain the safety committee and maintain the protection of the employer from citations for serious violations. And we have then created a situation where in order to get any enforcement and maintain a safety committee, you must prove a willful violation on the part of the employer.

Senator **Schweiker**. You keep forgetting. If your safety committee makes a recommendation that management ignores, the violation is willful. You forget the key part of the bill. Mr. Chairman, you know, we can go on all day—I have been here 5 hours now.

But all I can say is my bill means what I say it means. And you have a right to say it doesn't, but that's the whole problem of why the issue is polarized and why we can't get together on it.

Senator **Riegle**. Well, I think this exchange—these exchanges are useful and necessary.

Senator Schweiker. I'm glad to hear that, Mr. Chairman. [Laughter.]

It's very constructive to hear that; I appreciate that.

Senator Riegle. I am trying to allow anybody a chance for a last word, I don't want to just cut it off, if anybody else has anything they want to say, or are we at a point where perhaps we can leave it as it is.

Mr. Glasser. Senator Riegle, we thank you very much for this opportunity. We say to you that our testimony is sincere testimony based on our direct experience with the OSHA law and in 3,000 workplaces. We say, too, that the overwhelming evidence, based on the statistics, which unfortunately Senator Schweiker was not here to listen to, that those data, which I am certain he will read in the record, contradict the assertions made about no improvement in safety records; they indicate in fact that the effect of this bill would be harmful to workers, that it would be harmful to the OSHA law, and it would be a major step backward in the progress of protecting workers.

[The following was received for the record:]

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May 28, 1980

The Honorable Harrison A. Williams, Jr.
The United States Senate
Committee on Labor and Human Resources
Washington, D.C. 20510

Dear Senator Williams:

Thank you for the opportunity to amplify our testimony at the OSHA Legislative Hearing. Your questions on targeting of OSHA safety inspections are quite well taken and go to critical issues in the improvement of OSHA's effectiveness.

There is no disagreement that OSHA should allocate its safety inspection resources to eliminating conditions most likely to cause injury. However, a discussion of "targeting" must distinguish between adjusting priorities for inspections by industry type and determining the priorities for inspections of individual work sites. A second and distinct issue is the mechanism for the allocation of resources once priorities have been determined.

In this regard, S. 2153 attempts to target individual work sites based on employer-reported, individual plant-wide injury rates. The UAW strongly opposed this aspect of the Bill for a series of reasons. It will actually direct resources away from plants and occupations recognized to be hazardous. The compilation and analysis of this data poses great administrative difficulties. Additionally, directing resources by legislative exclusion of workplaces from inspections and, in some cases, penalties is an allocation mechanism which will have major adverse effects on existing successful safety programs.

"How do you think OSHA could effectively target on hazardous operations rather than on hazardous industries as it now does?"

In our testimony, the term "hazardous operation" referred to sub-units of the production process or particular duties within a plant or industry.

In concept, at least, the conclusion that an industry is hazardous and deserves priority for inspection is a summation of the hazards of the unit operations within that type of industry. The primary measure of hazard used by OSHA has been injury rate data compiled by the Bureau of Labor Statistics. These industries then receive greater attention from general scheduled inspections.

In our testimony we pointed out that a majority of fatal accidents in UAW-represented plants were suffered by workers engaged in maintenance operations, primarily the Skilled Trades. (The UAW has not been able to compile data on injuries by job classification or occupation.) The importance of this observation is that miniority occupations which are common to many plants are at high risk, even if the plants were engaged in industries which would be considered low priority for inspection. For example, the Skilled Trades are less than 20% of the work force in the automobile industry. Therefore, industry-wide injury rates, or plant-wide injury experience, even if accurate, will not predict hazards and trigger preventive inspections to cover those perhaps most at risk. Material handling operations (crane, fork truck) are similar widespread, integrated, hazardous minority occupations.

To make OSHA inspections, however targeted, more effective in protecting workers in these occupations, enforceable standards to eliminate the hazards specific to the high injury occupations must be enacted. Standards for power lock-out and entry into confined spaces are in process. These standards should include training for workers and record keeping which would permit auditing of the compliance with procedures and practices. Tightened training and record keeping requirements for standards for cranes and powered industrial trucks would similarly be helpful to workers, inspectors, and employers.

With regard to inspections, Compliance Officers should review the required OSHA daily injury log on all visits to a work site to note whether serious or notable injuries have occurred. Special emphasis should be placed on a review of maintenance and material handling operations, whether these were the trigger for the inspection or not. To a degree this is already the case.

We note that this type of inspection -- beyond the normal scope of a complaint -- would be specifically prevented by provisions of S. 2153.

"Do you think that complaints provide a mechanism by which the Agency can target on hazardous operations?"

Complaints are a mechanism but not the sole mechanism by which hazardous operations can be targeted.

Continuing our discussion of maintenance operations, the exposure of workers to safety hazards is likely to be intermittent and occur on off shifts. The violation is, therefore, less likely to be observed by daytime OSHA inspections than the more widespread hazards of regular production. Worker, or Union complaints are a prime mechanism by which these conditions would come to be known to OSHA.

To reinforce this, workers and employers lack clear direction on safe practices in the form of standards. Therefore, the existence and abatement of an unsafe condition is more likely to be in dispute for an operation of this nature.

Complaints should not be the only mechanism of identifying hazardous conditions and choosing where to schedule plant inspections. The plants where workers are not educated in health and safety, or are unaware of their rights, or where employers are not informed sometimes have the most hazardous conditions. It is just these work sites where complaints are not filed. General scheduled inspections, arranged in priority by the degree of hazards expected within a type of industry, must be continued.

We hope these comments respond to your concerns. We will be happy to amplify them further, if you wish.

Respectfully,

Melvin A. Glasser

Melvin A. Glasser, Director
Social Security Department
INTERNATIONAL UNION, UAW

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Senator **Riegle**. Senator Cranston, do you have any comment that you wish to make?

Senator **Cranston**. No, I don't, thank you.

Senator **Riegle**. Senator Schweiker, anything else? If not, I thank the witnesses, and we appreciate your testimony.

We will call the next witnesses, Mr. Patrick Babcock, who is the director of the Michigan Department of Labor, and Mr. Don Vial, who is the director of the California Department of Industrial Relations.

And as they are coming to the table, let me particularly welcome Mr. Babcock from my home State. And, Senator Cranston, do you have any comment that you want to make at this point?

Senator **Cranston**. No, except to welcome Don Vial who is a long-time friend of mine from California. He has a lot of experience in California with the California approach, which I think is a very, very fine program. His testimony will be particularly helpful.

Mr. **Vial**. Thank you.

Senator **Riegle**. Let me say to the witnesses that we will make your entire statements a part of the record, and it would be helpful to us—you have been patient in waiting, and we would ask you to summarize your remarks as much as possible.

And in deference to my colleague from California, let me start with the California witness, Mr. Vial.

Senator **Cranston**. I do appreciate the courtesy, but I have to leave within 1 minute.

Senator **Riegle**. In any event, let me extend that courtesy.

STATEMENTS OF DONALD VIAL, DIRECTOR, STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, SAN FRANCISCO, CALIF.; AND C. PATRICK BABCOCK, DIRECTOR, MICHIGAN DEPARTMENT OF LABOR, LANSING, MICH.

Mr. **Vial**. Thank you. I am Don Vial. I am the director of the department of industrial relations and the State's designated official with overall responsibility for the California/OSHA program. And I am here to express our grave concerns about S. 2153, and to indicate why we believe its enactment would have a devastating impact on California's efforts to carry out the measure's stated intent.

I think it's well understood that we in California have a strong working relationship with the Federal Government, the Federal OSHA program, since Dr. Eula Bingham has been Assistant Secretary of Labor for OSHA. In California we have a commitment and we have the capacity to be on the frontier of using injury data and other targeting methods for improving occupational health and safety.

In fact, in concert with Federal OSHA, we have already moved in so many specific ways to carry out the stated purpose of this proposed law that we can't quite understand why it is being advanced.

So my testimony is to indicate with emphasis on California's experience why the major statutory concepts behind S. 2153 are fatally flawed. And they would fall in three areas.

First, is the idea that targeting can be reduced to statutory directives and priorities without undermining the administrative flexibility required for effective use of inspection resources. When targeting becomes the means of gaining effective statutory immunity from inspections, it fatally erodes the important role inspections assume in developing educational and other less enforcement-oriented methods which seem to be preferred by this piece of legislation.

Workers' compensation injury reports in particular are potentially a valuable administrative tool for targeting inspections when used in combination with other targeting indicators. Their administrative potential, however, would be lost and destroyed under S. 2153. Moreover, it would take substantial time and money to develop a national system for implementing the kind of program being contemplated.

The second concept that we believe flawed is the concept that advance notice to employers of complaint-based inspections will actually enhance voluntary compliance. Our experience is that voluntary responses to workers' complaints will occur principally when it is understood that employees are secure in their protected right to get action on valid complaints. The proposed confined scope of permissible inspections, in combination with the advance notice to employers, both would erode the present protected rights of employees to get action and convert the positive role of employee complaints into a disincentive to voluntary compliance. The focus instead should be on positive incentives to involve employees in voluntary approaches that achieve compliance and preventive action faster than OSHA can do it. That should be the focus.

Third, is the fallacy in S. 2153 that the utilization of safety committees and consultation programs to improve safety and health can be effectively encouraged by the proposed limitation or the elimination of penalties for cited violations of standards. It would be more appropriate for Congress to adopt the Presidential task force recommendation which would focus on the direct cost incentives of workers' compensation without diminishing safety enforcement activities. There may be a great need for health and safety considerations in the workplace to transcend potentially destructive aspects of adversary relationships, but it is really wishful thinking to believe that workers and their representatives are going to embrace safety committee activities at the cost of blunting OSHA enforcement tools, especially under the proposed conditions of S. 2153 that restrict safety committees to essentially consultative roles. And it is very clear in the law, in the bill as it is written, that it is a consultative role and nothing more.

Shared authority to help implement employers' responsibility to maintain safe and healthful workplace environments, particularly in a nonadversary setting, must be viewed as a higher level of enforcement and preventive activity, not as an alternative to the enforcement tools and responsibilities of government.

Now, in written testimony that I have submitted we go into these three flawed concepts in some detail.

With regard to the first concept, the idea that you can deal with targeting in a statutory context, I think it is important to understand that the real reason for targeting is to use our limited resources most effectively in an administrative sense. "Worst first" is an important concept in scheduling inspections, but it is extremely short-sighted to view targeting by injury rates for specific standards enforcement as the exclusive method of achieving compliance. Inspection targeting must be used to achieve other compliance goals as well. In fact, not all injuries and accidents or harmful exposures are preventable by specific standards. Other essential techniques of compliance include worker education, which is a California/OSHA requirement, and voluntary approaches such as consultation. Certainly no technique is mutually exclusive or a substitute for the other.

Equally vital is a health and safety consciousness in the workplace: the involvement and knowledge of workers of health and safety hazards. And California/OSHA has moved forcefully in all of these directions in recent years.

Now, we happen to be one of the States that has begun using workers' compensation data in our targeting efforts, but we have done so with our eyes open to its limitations. Our workers' compensation data base is in use for scheduled inspections at the present time, but we must emphasize that it is still in a developmental stage. Its use is experimental in conjunction with other targeting approaches, and its effectiveness is still to be validated. Again, workers' compensation reports' usefulness can only be understood in combination with other targeting indicators.

Since we are one of the few States that collects lost-time injury data in usable form for experimental targeting purposes, you can appreciate our dismay at the thought that it actually can be used in a statutory targeting system. When we first started our targeting method, using workers' comp with other information, we were immediately approached by our legislative body in California, in Sacramento, and we resisted and stopped that effort to embody it in statutory language. And we urge you in Congress to resist the temptation also. Don't destroy a potentially useful administrative tool—and I want to emphasize its potential as an administrative tool.

In the absence of a national data base, the reliance on employer affidavits to gain immunity from scheduled inspections would only compound the problem. We urge you not to put OSHA in the impossible position of having to monitor the veracity of employers. We have enough paperwork problems without becoming mired down in another paper mill. If there is a serious interest in making useful workers' compensation data available to OSHA for administrative targeting, the attention of the Congress should be directed to the enactment or adoption of some national workers' compensation standards, and in those standards to include a data collection system that would make workers' compensation data available to administrators of OSHA in a useful way. But I emphasize that it must be for administrative purposes and not for statutory exemptions.

In California, we use workers' compensation first-injury reports required of employers for compiling our data base scheduling system. And I want to assure you that we talked long and hard with the employers about how they might react to this. And they were very concerned about the use of the workers' compensation first-injury reports. They first of all felt they weren't reliable; they did not indicate, from the employers' point of view, that they were even valid claims. Now, were these reports further tied to the virtual exemption from inspections, the validity of the reporting system could be severely undermined. That is another unknown to be monitored carefully, not placed in statutory concrete.

I have attached to our statement an item designated "Safety Data Base Inspection Scheduling System User's Guide," which explains how the workers' compensation injury reports are utilized in constructing the index and the complexities in using it. Now, this is the document that we have used in detail sessions for the training of our field people on how to use this limited-purpose index. Believe me, it takes a lot of training to make sure that it is not abused, and to recognize that it is only one tool that points a field person in the right direction. But it is no substitute for other ways of targeting, and absolutely requires professional judgment when you get into that workplace in deciding what you are actually going to do there.

So in the text of my statement I emphasize the points that you can read in detail in the attachment. Unfortunately, we do not have the time to go into our experimental use of worker's comp data in detail, but I would be pleased to answer any questions you may have.

Our experience in California also clearly demonstrates that many serious occupational hazards would be excluded under the narrow categories for permitted inspections under S. 2153. Almost all chemical and refinery plants, for example, do not appear on our safety data base, that is, our workers' comp data base. Moreover, under the criteria of S. 2153 they would be immune from scheduled inspections. Yet the practice of both industries is to hire contractors for maintenance and repair work, often the most dangerous and difficult work. These workers are rarely trained or informed of the hazards which are often created and controlled by the primary employer. Because these workers are employed by contractors, their workplace injuries never appear on our data base lists of major employers where the injuries and deaths actually occur. We had a tragic example of this in California recently when two subcontractor employees were killed and 84 injured by an explosion which occurred at the worksite of the primary employer. These deaths and injuries do not show up in the primary employer's injury records or the workers' compensation data that we would use in our data base, which is to emphasize again that you really have to use workers' compensation data with your eyes open. It is only a limited purpose administrative tool.

We rely on two other equally important types of targeting which would be precluded by S. 2153. These are permits and special-emphasis enforcement programs which comprise an essential part of our scheduled inspection system in addition to the safety data base that is workers' comp based.

The permits, of course, are required in activities like construction, demolition, trenching, and the use of explosives. This means we have a prejob conference where we are out there looking at the safety plans for these dangerous types of activity. The success of this method of targeting is clearly demonstrated by a 40-percent reduction in construction fatalities and a 35-percent reduction in mine-explosion fatalities with the advent of this permit system, which requires a preinspection type arrangement and consultation in advance of how it is going to be done.

To meet the problem of complex work practices where there is a lack of accurate work injury data, California/OSHA has pursued special-emphasis enforcement programs to assess particular industrywide health and safety problems. We have done this in the garment industry in Los Angeles, cotton gin operations in southern California, lead battery plants throughout the State, the construction and particle board industry, and so forth—I list a number of these in my prepared statement.

These additional targeting approaches would be eliminated—that's my point, eliminated—by the exemption criteria in S. 2153.

In summary, based on our limited experience with targeting from workers' compensation data, and the critical necessity of using permits and special-emphasis programs as additional targeting mechanisms, we would urge you to abandon your statutory targeting concepts in S. 2153 and to recognize the essential administrative character of targeting. We are dealing with the practical problem of making our capacity to conduct scheduled inspections count. That is what targeting is about; it should not be used for the kind of immunity that is being given here.

With regard to complaint investigations, the problems created in S. 2153 by eroding the ban on advance notice in connection with complaints of employees cannot be overemphasized. Its inevitable impact would be to undermine the sense of security of workers that is essential to the exercise of a protected right to get action on valid complaints. The loss of this sense of security will tend to dry up a critical source of hazard recognition that serves as a backup to the limited ability of OSHA and California/OSHA to conduct scheduled investigations.

The necessity of targeting scheduled inspections to "worst first" firms in high-hazard industries does not mean that there cannot be bad-performer firms in industries that rank low in the hazard index—and I use this hazard index in the context in which we developed it in connection with workers' compensation data as explained in detail in my written statement.

We have many examples in California of this nature where failure to have complained would have prevented some critically important inspections.

Mike Schneider, chief deputy for safety of the California/OSHA program, my colleague, is here with me. We are prepared to discuss any of these detailed examples of the kinds of inspections that would be precluded by S. 2153.

Senator RIEGLE. Let me just interrupt you long enough to say—I don't want to hurry you, but I want to be sure to get to our last witness, and we have got to conclude shortly.

Mr. VIAL. The point that needs to be emphasized in connection with the third flawed concept in the bill is that we have to move beyond the simple concept that a safety committee with mere consultative authority can do something. There has to be some real security built around the concept of shared authority. We should be looking at pioneering with our best collective bargaining relationships to develop nonadversary approaches to the workplace environment. And this means that we must have total sharing of information. We in California are putting a major effort at this time on "right-to-know" legislation. Peter Weiner, chief counsel of the department and a special assistant to the Governor, is here in the audience. He is working specifically on legislation which would provide full sharing of information with workers. The way safety committees are envisioned in the Schweiker bill, they amount to nothing more than a minimal form of consultation, put forth on the basis of negative incentives for reduced penalties. As we point out from our experience in California, negative incentives are no way to get positive responses out of the workplace.

I am sorry I have taken so long, Mr. Chairman.

Senator RIEGLE. Well, you have made a very good statement, a very strong statement; I appreciate the care that has gone into your presentation. And the California performance is one of the best in the Nation, and so your testimony carries a great deal of weight with us and with the committee.

And Senator Schweiker, who has been here 5 hours today and who unfortunately can't be here this moment, but who has given a great deal of time and effort to this, I know will be interested in wanting to digest what you have said here, because you have really delivered a very powerful indictment about some of the changes that would be both recommended and which would take place if that legislation as drafted were passed.

And I think that we have to give full weight and account to what you have said here.

So I thank you for that statement very much.

[The prepared statement of Mr. Vial, along with additional material submitted for the record, follows:]

STATEMENT OF DONALD VIAL

DIRECTOR,

CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS

BEFORE COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

APRIL 17, 1980

Mr. Chairman and members of the Committee, my name is Donald Vial. I am Director of the California Department of Industrial Relations and the state's designated, cabinet-level official with overall responsibility for the Cal/OSHA program. I am here to express our grave concerns about S.2153, and to indicate why we believe its enactment would have a devastating impact on Cal/OSHA's efforts to carry out the measure's stated purposes -- namely "to concentrate enforcement activities on hazardous workplaces and encourage self-initiative in improving occupational safety and health...".

Under Federal OSHA, California is a "state plan" state that has enjoyed a strong working relationship with the Federal program since Dr. Eula Bingham has been Assistant Secretary of Labor for OSHA. By history and tradition, we view ourselves as a state with the commitment and capacity to be on the frontier of using injury data and other targeting methods for improving occupational health and safety. In fact, in concert with the initiatives of Dr. Bingham, OSHA and Cal/OSHA already have moved in so many specific ways to carry out the stated purposes of S.2153 that we find it difficult to understand why it is being advanced. It must be understood that the overriding impact of the statutory concepts advanced in this measure would be to undermine these administrative initiatives.

Much has already been said about the extent to which employers would be shielded from inspections and employees would be denied the protections of OSHA. Rather than giving you more numbers, the burden of my testimony is to indicate, with emphasis on California's experience, why the major statutory concepts behind S.2153 are fatally flawed. These flawed concepts can be identified at the outset as falling in three areas:

First, is the idea that targeting can be reduced to statutory directives and priorities without undermining the administrative flexibility required for effective use of inspection resources. When targeting becomes the means of gaining effective statutory immunity from inspections, it fatally erodes the important role inspections assume in developing educational and other less enforcement-oriented methods seemingly preferred by the measure to maintain healthful and safe places of work. The critical links between inspections and those other methods of compliance and injury-prevention are both denied and destroyed. Workers' compensation injury reports in particular are potentially a valuable administrative tool for targeting inspections when used in combination with other targeting indicators. Their administrative potential, however, would be lost and destroyed under S.2153. Moreover, it would take substantial time and money to develop a national system for making workers' compensation data available to OSHA administrators, and S.2153's inspection straightjacket and affidavit system could greatly impede the development of that data system.

Second, is the concept that advance notice to employers of complaint-based inspections will enhance voluntary compliance. Our experience is that voluntary responses to worker complaints will occur principally when it is understood that employees are secure in their protected right to get action on valid complaints. The proposed, confined scope of permissible inspections,in combination with the advance notice to employers,both would erode the present protected rights of employees to get action and convert the positive role of employee complaints into a disincentive to voluntary compliance. The focus, instead, should be on positive incentives to involve employees in voluntary approaches that achieve compliance and preventive action faster than can be obtained from OSHA inspection and compliance activities, without diminishing OSHA's enforcement authority.

Third, is the fallacy in S.2153 that the utilization of safety committees and consultation programs to improve safety and health can be effectively encouraged by the proposed limitation or elimination of penalties for cited violations of standards. It would be more appropriate for Congress to adopt the Presidential taskforce recommendation, which would focus on the direct cost incentives of workers' compensation without diminishing safety enforcement activities. There may be a great need for health and safety considerations in the workplace to transcend potentially destructive aspects of adversary relationships, but it is wishful thinking to believe that workers and their representatives are going to embrace safety committee activities at the cost of blunting OSHA enforcement tools, especially under the proposed conditions of S.2153 that restrict safety committees to essentially consultative roles. Shared authority to help implement employers' responsibility to maintain safe and healthful workplace environments --particularly in non-adversary settings -- must be viewed as a higher level of enforcement and preventive activity; not as an alternative to the enforcement tools and responsibilities of government.

Targeting and the Use of Workers' Compensation Data

Targeting is essential in the OSHA program primarily because limited resources must be used most effectively in an administrative sense to significantly reduce health and safety hazards in the workplace. "Worst first" is an important concept in scheduling inspections, but it is extremely short-sighted to view targeting by injury rates for specific standards enforcement as the exclusive method of achieving compliance. Inspection targeting must be used to achieve other compliance goals as well. In fact, not all injuries and accidents or harmful exposures are preventable by specific standards. Other essential techniques of compliance include worker education, which is a Cal/OSHA requirement, and voluntary approaches such as consultation. Certainly no technique is mutually exclusive or a substitute for the other.

Equally vital is health and safety consciousness in the workplace: the involvement and knowledge of workers of health and safety hazards. Cal/OSHA has moved forcefully in all of these directions in recent years.

We are one of the states that has begun using workers' compensation data in our targeting efforts, but we have done so with our eyes open to its limitations. Our workers' compensation data base is in use for scheduled inspections at the present time, but we must emphasize that it is still in a developmental stage. Its use is experimental in conjunction with other targeting approaches and its effectiveness is still to be validated. Again, workers' compensation reports' usefulness can only be understood in combination with other targeting indicators.

Since we are one of the few states that collects lost-time injury data in usable form for experimental targeting purposes, you can appreciate our dismay at the thought that it actually can be used in a statutory targeting system. We resisted this in Sacramento, and we urge Congress to resist the temptation. Don't destroy a potentially useful administrative tool.

Fed OSHA has provided you with detailed information on the sorry condition of workers' compensation data sources at the state level and on the problems involved in developing a usable national data base for OSHA purposes. In the absence of such a national data base, the reliance on employer affidavits to gain immunity from scheduled inspections would only compound the problem. We urge you not to put OSHA in the impossible position of having to monitor the veracity of employers. We have enough paperwork problems without becoming mired down in another "paper mill". If there is serious interest in making useful workers' compensation data available to OSHA for administrative targeting, the attention of the Congress should be redirected to the enactment of federal standards for state workers' compensation programs and to include a standard for developing and sharing workers' compensation data with OSHA.

In California, we use workers' compensation first injury reports required of employers for compiling our data base inspection scheduling. In this connection, employers are seriously concerned with the reliability of these first injury reports, since they do not necessarily reflect the employers assessment of the validity of a claim. We have discussed these concerns openly, and we are alert to the possibility that known use of these reports for inspection scheduling could affect both the character and the filing of the reports. Were these reports further tied to a virtual exemption from inspections, the validity of the reporting system could be severely undermined. This is another unknown to be monitored carefully, not placed in statutory concrete.

The attachment designated "Safety Data Base Inspection Scheduling Sytem User's Guide" explains how the workers' compensation injury reports are utilized in constructing the index and the complexities in using it. The following points need to be emphasized:

-- As noted at the outset of this section, since not all job-related injuries are related to standards violation, we determined that it was essential to develop a hazard index for the purpose of ranking the 99 industries included in the inspection data base. This hazard index was constructed in order to separate injuries deemed to be related to safety order violations from other injuries, and to capture the most serious injuries from data derived from actual accident investigations in Cal/OSHA files. Subsequent statistical analysis provides support for the methodology used in constructing the hazard index, but it is still to be validated by field experience.

-- The system has little value for targeting health hazards, since occupational illnesses are grossly under-reported through workers' compensation. Indeed, 40% of our health inspections result from referrals by trained safety engineers, who identify complex health problems once they are present in the workplace for a safety inspection. We do not have evidence that the safety data base is correlated with the incidence of health hazard referrals.

-- The hazards index is used to rank the industries, but within each industry, firms are arrayed by the number of all injuries -- not only those deemed to be related to safety order violations -- with information on size of firms and individual firm incidence rates. This is to emphasize again that workers' compensation data can be used to point Cal/OSHA inspectors in the right direction, along with the use of other available targeting indicators, but it is no substitute for the exercise of professional judgment in determining what kind of an inspection is to be made.

-- Professional judgment involves examining the firm's injury and illness log, assessing the nature of the firm's problems, and doing a qualitative analysis to be used in developing subsequent industry profiles for employing the full range of tools and approaches needed to bring down and prevent injuries. These are far-reaching objectives still to be realized and validated, also.

-- Finally, it should be noted in connection with our use of workers' compensation data that we are using information covering only in a five month period, based on a 50 percent random sample of reported disabling injuries or illnesses. A 100 percent sample is desired along with a moving full-year of information in the data base.

Our experience in California clearly demonstrates that many serious occupational hazards would be excluded under the narrow categories for permitted inspections under S.2153. Almost all chemical and refinery plants, for example, do not appear on our safety data base; moreover, under the criteria of S.2153, they would be immune from scheduled inspection. Yet the practice of both industries is to hire contractors for maintenance and repair work -- often the most dangerous and difficult work. These workers are rarely trained or informed of the hazards which are often created and controlled by the primary employer. Because these workers are employed by contractors, their workplace injuries never appear on our data base lists of major employers where the injuries and deaths actually occur. For example, two sub-contractor employees were recently killed and 84 others injured by an explosion which occurred at the worksite of the primary employer. These deaths and injuries do not show up in the primary employer's injury records.

We rely on two other equally important types of targeting which would be precluded by S.2153. These are permits and special emphasis enforcement programs, which comprise an essential part of our scheduled inspection system in addition to the safety data base.

Permits are required in California for work practices which by their very nature involve a substantial risk of injury, e.g. certain aspects of construction; demolition; trenching; and use of explosives. The success of this method of targeting is clearly demonstrated by a 40% reduction of construction fatalities and a 35% reduction in mine explosion fatalities with the advent of permits.

To meet the problem of complex work practices where there is a lack of accurate work injury data, Cal/OSHA has pursued special emphasis enforcement programs to assess particular industry-wide health and safety problems.

We have to date examined the garment industry in Los Angeles, the cotton gin operations in Southern California, the lead battery plants throughout the State, the construction and particle board industry, and intend in the very near future to inspect refineries statewide. We feel we have had a high degree of success with this unique approach and have left a legacy of safety and health awareness to both labor and management. These additional targeting approaches would be eliminated under the exemption criteria of S.2153.

In summary, based on our limited experience with targeting from workers' compensation data, and the critical necessity of using permits and special emphasis programs as additional targeting mechanisms, we would urge you to abandon your statutory targeting concepts in S.2153 and to recognize the essential administrative character of targeting. We are dealing with the practical problem of making our capacity to conduct scheduled inspections count. We have no intention of using our experimental system to provide the kind of immunity from inspections that would result from the passage of S.2153. We ask you again not to destroy our experimental efforts at the very point when we can begin to draw some conclusion on the effectiveness and limitations of using a workers' compensation data base and the best means of integrating our various targeting methods.

Complaint Investigations and Erosion of the Ban on Advance Notice

The seriousness of the problems created by eroding the ban on advance notice in connection with complaints of employees cannot be over-emphasized. Its inevitable impact would be to undermine the sense of security of workers that is essential to the exercise of a protected right to get action on valid complaints. The loss of this sense of security will tend to dry up a critical source of hazard recognition that serves as a back up to the limited ability of OSHA and Cal/OSHA to conduct scheduled inspections.

The necessity of targeting scheduled inspection to "worst first" firms in high hazard industries does not mean that there cannot be bad-performer firms in industries that rank low in a hazard index such as the one used in California for targeting inspections. We have many examples in California of this nature where failure to have complained would have prevented some critically important inspections.

For example, on October 4, 1979, Cal/OSHA made an inspection of the Clorox plant in Oakland in response to a worker complaint concerning the breakdown of a filtering system resulting in chlorine releases. At the time of the inspection, approximately 42 employees worked at the plant.

During the inspection, Cal/OSHA found that self-contained breathing apparatus were not maintained in effective operating and sanitary condition. Nor were workers adequately trained in the use of the apparatus. Consequently, Clorox was cited for four safety and health violations.

The value of this inspection was underscored one month later when a serious leak occurred while chlorine was being transferred from a tank car to the plant. Clorox's compliance with Cal/OSHA requirements for respiratory equipment and training enabled a worker to use the equipment properly to rescue a fellow worker and stop the leak. Had the leak not been stopped when it was, the chlorine gas escaping could have affected several surrounding cities. In fact a major highway and the San Francisco Bay Bridge were closed for forty minutes during the incident.

OSHA's ability to inspect Clorox based on a worker's valid complaint and remedy health and safety problems thus prevented potentially serious exposure to many workers and the entire community as well.

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Another example of the importance of the complaint process is the case of National Metal and Steel Corporation, a ship salvage contractor in Los Angeles. The facility has 15 operating cranes and occupies 50 acres, which makes difficult any continual monitoring of work conditions. Cal/OSHA made a number of inspections based on worker complaints at different times. These complaints uncovered many serious health and safety problems beyond the original complaints and resulted in health referrals for asbestos and lead exposures.

The first inspection (May 26, 1977) was triggered by an employee complaint regarding overloading of crane operations. The inspection revealed much more hazardous safety problems, including exposed wiring, unguarded equipment, and no annual inspection certificate on the cranes. The citations were not appealed.

Another inspection (September 1977) in another area resulted from a Federal OSHA inspection which noted presence of asbestos. This safety inspection produced 4 general violations and health violations relating to asbestos and lead exposure.

Another worker complaint (November 1977) referred to minor safety problems of broken windows in crane cabs. Cal/OSHA's inspection on this complaint uncovered 1 general, 2 repeat/generals, and 1 repeat/serious violations of exposed wiring, inadequate guarding and personal protection. These violations were much more substantial than originally noted.

This case is a striking example of the importance of complaints in achieving compliance under Cal/OSHA. Before Cal/OSHA, my colleague Michael Schneider, who is here with me today, recalls as a construction electrician, that he even knew when an inspection was going to occur. As if by a miracle, one morning the project superintendent would have the site cleaned of debris, warning signs would be placed all over, barriers erected, scaffolding made secure, and all workers told to slow-up--"don't do anything dangerous". Immediately after the so-called inspection the work site would revert back to its previous unsafe condition.

The proposed, confined scope of investigations in S.2153 in response to complaints is also a prescription for the denial of the importance of being able to exercise professional judgment in determining whether a "wall-to-wall" inspection is called for. The examples are many where a decision to conduct a wall-to-wall in response to a complaint was critical in eliminating imminent as well as serious hazards

For example, on July 5, 1979, Cal/OSHA initiated an inspection of Texaco Refinery located in Wilmington, California, in response to workers' complaints regarding inadequate training and testing of self-contained breathing apparatus and probable exposure to asbestos. Texaco employs approximately 800 workers.

During the investigation of this complaint, Cal/OSHA's inspector saw many other safety violations which could likely have caused an explosion. Conversations with workers during the inspection revealed still other unsafe conditions in the refinery. On the basis of this additional information, the District Manager approved a wall-to-wall inspection. The inspection was complex and took over four months to complete. Cal/OSHA cited Texaco for: 1 general/regulatory, with 124 items; 22 serious; 4 willful/generals; 1 willful/serious; and 2 willful/serious/carcinogen violations. Penalties assessed were $39,500. The number of citations (30) does not reflect the fact that there were several instances of most violations and over 400 instances of violations in all. Cal/OSHA additionally issued citations for 9 carcinogen violations to United Maintenance Engineering, a sub-contractor employed by Texaco at the site.

Under S.2153:

1. Texaco could not have been inspected based on workers' compensation data.
2. Nor could Texaco have been inspected on the basis of the limited employee complaints, had the employer responded with unverified assurances that the problem would be remedied.

3. The inspection would have been limited to the narrow items in the complaint. The wall-to-wall inspection (and subsequent discovery of over 400 instances of safety and health violations) would never have been made.

4. Penalties, and thus deterrence of future misconduct, would have been significantly reduced.

The incident at Texaco is one example of the overlap between safety and health hazards and of the foolhardiness of putting statutory blinders on OSHA inspectors. This is especially true because we have trained our safety engineers to recognize and deal with routine health violations. I have attached the field guidelines for such inspection activity to give you an idea of the variety of health problems safety inspectors routinely handle and to have the Committee note that elimination or curtailment of safety inspections would have a substantial effect on the level of *health* protection in the workplace.

Further, voluntary responses on the part of employers to correct hazards identified by workers are not advanced by eroding the protected right of workers to get action from OSHA on valid complaints. A case in point is the San Onofre demonstration project which Cal/OSHA is conducting in cooperation with the National Constructors Association and the California Building and Construction Trades Council near San Diego. There, one of the objectives of a joint on-site voluntary compliance program is to achieve compliance and preventive action faster than can be realized through Cal/OSHA inspection and compliance activities. Scheduled inspections are deferred so long as the accident rate is well below industry rates for the type of construction, but the whole arrangement is grounded in the full preservation of employee rights to get action from Cal/OSHA on serious complaints. In a monitoring context by Cal/OSHA, complaints of a non-serious nature are referred to the joint on-site committee for action, but we would like to see employees use the joint committee for serious complaints also.

AN index for determining whether the program is working effectively is when the employees have enough confidence to use the joint committee to handle serious hazards and feel secure enough to sign their names to complaints.

The San Onofre experiment is clearly one that avoids the false premise that voluntarism by employers is dependent upon advance notice to employers when complaints are involved. Quite to the contrary, it is based on the concept that the protected right to get action on valid complaints must be fully protected in the OSHA program.

Incentives to Use Safety Committees and Consultation

The implicit assumption underlying S.2153's limitation of penalties for employers who use safety committees must be that safety committees can be a valuable tool in preventing workplace injuries and that employers will be encouraged to establish meaningful joint committees by monetary incentives. The bill thus misunderstands both how cost incentives work and the prerequisites of establishing joint safety committees that really count.

To the extent that costs are involved, OSHA internalizes costs incurred to prevent accidents and illnesses, while workers' compensation internalizes costs for the failure to prevent them. The objective of both OSHA and workers' compensation should be to strengthen relationships so that two together have a synergistic effect in coming down on the side of prevention.

The safety committee concept can be unilateral or joint. From the employer's unilateral view, his selecting a group of employees for regular meetings can enhance employer training programs. The rising cost of workers' compensation alone should be a sufficient incentive for this token form of committee, without undercutting penalty incentives in enforcement activities.

Moreover, employer training can be enhanced without recourse to such incentives. In California, we have adopted an OSHA standard that requires accident prevention programs which have a direct impact on promoting safety committees without any negative impact on enforcement activities. The requirement contained in General Industry Safety Order 3203, says:

> "3203. Accident Prevention Program.
>
> (a) Every employer shall inaugrate and maintain an accident prevention program which shall include but not be limited to the following:
>
> (1) A training program designed to instruct employees in general safe work practices plus specific instruction with regard to hazards unique to any job assignment.
>
> (2) Scheduled periodic inspections to identify and correct any unsafe conditions and work practices which may be found."

We view this standard as an effective tool that buttresses the cost incentives of workers' compensation and that augments similar requirements of workers' compensation insurers. This approach obviates any need to weaken or otherwise compromise OSHA enforcement tools.

The second concept of safety committees is by far the most important. That concept sees such committees as creating an environment for non-adversarial and truly joint determination of what technological and work practice changes are necessary to achieve safer and healthier working conditions. At the minimum, such committees have equal representation of elected employee representatives, access of committee members to all relevant production, technical, and medical information, regular meetings with written minutes, and authority to make actual operational and design decisions. The real challenge ahead is to foster such non-adversary approaches.

The kind of tokenism for safety committees proposed in S.2.53 seems almost sure to promote just the opposite. There is nothing more frustrating to workers than to hold out a carrot of joint determination that turns out to be little more than token consultation. That would be a sure way of undercutting the development of meaningful joint committees and of encouraging employees to end-run them to the nearest OSHA office. We don't think it is healthy or productive for OSHA and Cal/OSHA field personnel to be seen only as cops. We would like, especially, that our consultants be seen and used as marriage counselors for purposes of promoting more joint determination on health and safety matters in the workplace.

In conclusion, we urge you to adopt a positive approach, funding OSHA to study various targeting methods and meaningful joint committee experiences. What we see in S.2153 are too many negatives and an attempt to advance more self-initiative in improving occupational safety and health by means which are actually disincentives to voluntary action. They simply won't work.

January 18, 1980

Safety Data Base Inspection Scheduling System User's Guide

GOAL

The goal of this data base is to establish a priority system to schedule on-site safety inspections by the Division of Occupational Safety and Health.

Within this system, industries are ranked according to a hazard value determined by the "preventable incidence rate" (PIR).[1] A total of 195 private sector industries were ranked according to this hazard index. The top 99 industries in this ranked list were then selected for inclusion in the safety data base (SDB). For all 195 industries, the average "PIR" rate on an annualized basis was 1.64. Hence, all 99 industries in the SDB have a "PIR" rate above the annual all-industry average.[2]

The attached list shows the 99 industries arrayed according to the "PIR". This table shows two rates: (1) the annual rate in the second column, and (2) the five-months' rate in the first column. A five-months' rate is shown in order to be consistent with the fact that this SDB totals injuries for the firms for a five-month period (April 1979-August 1979). It is the five months' rate that appears in the SDB.

The strategy for achieving the goal of prioritizing safety inspections is to direct enforcement activities to industries arrayed by the hazard index shown on the attached list and then to firms which reported injuries or illnesses in the April 1979 - August 1979 period (five months) according to the following criteria established by the Chief and Deputy Chief for Safety in the Division of Occupational Safety and Health. (See attached memorandum by the Chief, Art Carter.)

1. If a firm has an aggregate incidence rate per 100 employees of 1.62 or greater in the SDB, this firm should be included in the inspection schedule.[3]

2. If the firm's aggregate incidence rate is less than 1.62, then the District Manager can only authorize an inspection with prior authorization from the Regional Manager.

3. If an inspection has taken place in any of the listed firms since April 1979, the firm should not be included in the inspection schedule unless specific reasons can be provided to the Regional Manager.

4. For some firms, no employment data were available so that no incidence rates are shown. In such cases, District Managers should assess the need for an inspection on the basis of the industry's rank, the number of injuries shown, in addition to other data in the files.

5. For some firms, a statewide incidence rate appears. These rates are noted with three stars. The same criteria should apply as in Item 4 above.

6. If a firm is in the construction industry, the address of the firm must be checked. For the construction industry firms, the names listed provide likely candidates for an inspection on a construction project.

7. All firms in Los Angeles County appear in one listing. District Offices within this county must identify those firms within their geographic jurisdiction.

METHODOLOGY

This SDB listing shows all private firms in the highest ranked 99 industries according to the hazard values that reported one or more disabling work injuries or illnesses to the Division of Labor Statistics and Research over the five-month period, April-August 1979. This Safety Data Base is based on a 50 percent random sample of all disabling injuries or illnesses reported over this period.

Industries and establishments are organized by district and region according to the organizational structure of the Division of Occupational Safety and Health. The only exception is Region 4 (Los Angeles County) where data are shown for the entire county, with no breakdown into districts.

The 99 industries, three-digit for manufacturing, two or three digit for construction and two digit for the balance of nonmanufacturing, are arrayed according to the magnitude of the preventable incidence rate. These rates were derived from a methodology which attempts to get at injuries most likely to be associated with violation of safety orders. The "PIR" rate should be considered the Hazard Index.

The attached list shows the industry array in descending "PIR" order for the 99 industries included in the Safety Data Base.

GUIDE TO INTERPRETING THE LISTING

Industry data

1. Industry name: The heading for each industry shows the Standard Industrial Classification Code (SIC) and the industry name. Industries have been arrayed in descending order by the "PIR" rate, in the same order as on the attached sheet.

2. Annual average employment: This represents the average monthly employment for the industry over an entire year.

3. Total injuries and illnesses: This is the total number of disabling injuries and illnesses reported to the Division of Labor Statistics and Research on the "Employer's Report of Occupational Injury or Illness" over a year period.

4. Total IR: This is the total incidence rate (IR) for the industry. It is the number of injuries and illnesses per 100 workers and is based on five months of injury data, in order to be comparable to the five-month data used for the establishments on the listing. The total IR can be considered to be

the average rate for the industry and can be used to compare with the rate given for an individual establishment.

5. "PIR" injuries: This is the total annual number of injuries in the industry determined to be preventable by compliance with safety orders.

6. "PIR" rate: This is the number of injuries determined to be preventable by compliance with safety orders per 100 workers, calculated on a five-month basis.

Establishment data: Under each industry individual establishments are arrayed by the number of disabling injuries reported to the Division of Labor Statistics and Research over the five-month period April-August 1979.

The following information is shown for each establishment:

1. Company name and address.

2. Number of employees: Each establishment is assigned a size class based on employment as of March 1978. In a case where a company has many locations within a county, all of which are classified in the same SIC code, the size class reflects the company's county-wide employment. An example would be a trucking company which has several terminals in Los Angeles County. While each establishment which reported injuries would be listed separately, the size class assigned represents employment for all locations in the county.

3. Total disabling injuries: This represents the total number of disabling injuries reported over the five-month period by the establishment at the street address listed.

4. Total I.R.: This is the number of injuries and illnesses per 100 workers based on five months of injury data. This rate can be used to compare with the "Total IR" for the entire industry to determine if the individual establishment is higher or lower than the industry average.

For firms with a single location in a county, this rate is the number of injuries or illnesses per 100 workers based on five months of data.

In the case of the trucking company above with more than one location in a county, the rate calculation is different. Since employment data are only available on a countywide basis, a countywide incidence rate is calculated by adding up the injuries at all locations in the county. Thus, each location in Los Angeles County which reported injuries over the period would show the same incidence rate.

In some cases, the employment figure available was statewide rather than countywide. Rates calculated for these establishments are statewide. These rates are marked with *** on the listing.

FOOTNOTES

1. This rate has been derived by disaggregating the total job-related injuries and illnesses for each of 195 private sector industry groups into three categories, (1) those deemed related to safety order violations, (2) those deemed related to training and/or education efforts, and (3) those that did not fall in either of the preceding categories such as airplane accidents, bee stings, etc. Injuries or illnesses in the first category were summarized for each industry and divided by the industry's annual average employment to obtain a "preventable incidence rate" per 100 employees. This hazard index was constructed in order to capture, as far as is possible with available data, the most serious injuries. Subsequent statistical analysis provides support for the methodology developed.

2. As seen in the attachment listing the industries, the lowest annual "PIR" is 2.33. The top 99 industries were selected by top management in the Division of Occupational Safety and Health on the basis of deriving a list that was feasible to implement with respect to available inspection resources.

3. The total incidence rate averaged 1.62 for all disabling work injuries on a five-months' basis. For the firm, only a total incidence rate is provided in the SDB, i.e., all disabling work injuries or illnesses are added because staffing does not permit time to provide a data base that will describe briefly each injury or illness. This means that the SDB points inspectors to firms with total incidence rates above the all-industry average, generally, and inspectors must use professional judgment when on the site after reviewing the firm's CAL/OSHA No. 200, the Log and Summary of Occupational Injuries and Illnesses, which lists the injuries or illness that have occurred.

LIST OF TOP 99 INDUSTRIES IN THE HAZARD INDEX

ARRAYED IN DESCENDING ORDER BY PIR RATE
(Incidence Rate Per 100 Employees)

SIC	INDUSTRY	FIVE-MONTHS' RATE	ANNUAL RATE
241	Logging	5.1	12.32
333	Primary nonferrous metals	5.1	12.29
311	Leather tanning	4.6	10.99
332	Iron and steel foundries	3.6	8.75
222	Weaving mills, synthetics	3.6	8.59
303	Reclaimed rubber	3.5	8.33
245	Wood buildings and mobile homes	3.4	8.21
178	Water well drilling	3.4	8.08
242	Sawmills and Planing mills	3.0	7.30
176	Roofing	3.0	7.20
334	Secondary nonferrous metals	3.0	7.19
228	Yarn and thread mills	2.9	6.93
336	Nonferrous foundries	2.8	6.81
201	Meat products	2.8	6.75
243	Millwork and plywood	2.7	6.58
244	Wood containers	2.7	6.55
207	Fats and oils	2.6	6.17
348	Ordnance and accessories	2.4	5.81
339	Misc. primary metal products	2.4	5.80
352	Farm and garden machinery	2.3	5.46
322	Glass and glassware	2.3	5.40
223	Weaving and finishing mills, wool	2.2	5.34
379	Misc. Transportation equipment	2.2	5.26
328	Cut stone and stone products	2.2	5.24
374	Railroad equipment	2.1	5.15
304	Rubber and plastics hose and belting	2.1	5.15
344	Fabricated structural metal products	2.1	5.02
349	Misc. fabricated metal products	2.1	5.00
375	Motorcycles, bicycles and parts	2.1	4.98
369	Misc. electrical equipment	2.1	4.96
306	Fabricated rubber products	2.0	4.90
323	Products of purchased glass	2.0	4.81
206	Sugar and confectionary products	2.0	4.76
249	Misc. wood products	1.9	4.66
347	Metal services, n.e.c.	1.9	4.53
341	Metal cans	1.8	4.36
325	Structural clay products	1.8	4.31
253	Public building and related furniture	1.8	4.29
265	Paperboard containers and boxes	1.8	4.28
353	Construction and related equipment	1.8	4.28
327	Concrete, gypsum and plaster products	1.8	4.26
204	Grain mill products	1.8	4.20
307	Misc. plastics products	1.7	4.17

SIC	INDUSTRY	FIVE-MONTHS' RATE	ANNUAL RATE
229	Misc. textile goods	1.7	4.16
130	Oil and gas extraction	1.7	4.12
346	Metal forgings and stampings	1.7	4.07
179	Misc. special trades contractors	1.7	4.06
276	Manifold business forms	1.6	3.88
358	Refrigeration and service machinery	1.6	3.82
264	Misc. converted paper products	1.6	3.81
262	Paper mills, except building paper	1.5	3.68
251	Household furniture	1.5	3.65
355	Special industry machinery	1.5	3.63
174	Masonry, stonework, plastering	1.5	3.63
208	Beverages	1.5	3.58
371	Motor vehicles and equipment	1.5	3.55
359	Misc. machinery, except elec.	1.5	3.55
329	Misc. nonmetallic mineral prods.	1.5	3.49
203	Preserved fruits and vegetables	1.5	3.48
252	Office furniture	1.4	3.45
221	Weaving mills, cotton	1.4	3.44
226	Textile finishing, except wool	1.4	3.42
266	Building paper and board mills	1.4	3.42
420	Trucking and warehousing	1.4	3.42
171	Plumbing, heating, air conditioning	1.4	3.27
150	General building contractors	1.3	3.23
209	Misc. foods and kindred products	1.3	3.22
254	Partitions and fixtures	1.3	3.20
354	Metalworking machinery	1.3	3.11
172	Painting	1.3	3.10
175	Carpentering	1.3	3.08
356	General industrial machinery	1.3	3.05
301	Tires and inner tubes	1.3	3.03
393	Musical instruments	1.3	3.02
202	Dairy products	1.2	2.96
227	Floor covering mills	1.2	2.95
205	Bakery products	1.2	2.93
289	Misc. chemical products	1.2	2.87
316	Luggage	1.2	2.85
313	Boot and shoe cut stock and findings	1.2	2.84
335	Nonferrous rolling and drawing	1.1	2.74
520	Building materials and garden supplies	1.1	2.72
285	Paints and allied products	1.1	2.70
343	Plumbing and heating, exc. elec.	1.1	2.68
331	Blast furnace and basic steel	1.1	2.65
363	Household appliances	1.1	2.64
342	Cutlery, hand tools and hardware	1.1	2.64
177	Concrete work	1.1	2.63
263	Paperboard mills	1.1	2.62
161	Highway and street construction	1.1	2.59
385	Ophthalmic goods	1.1	2.56

SIC	INDUSTRY	FIVE-MONTHS' RATE	ANNUAL RATE
259	Misc. furniture and fixtures	1.1	2.54
261	Pulp mills	1.1	2.53
760	Misc. repair services	1.0	2.44
224	Narrow fabric mills	1.0	2.36
295	Paving and roofing materials	1.0	2.34
364	Electric lighting and wiring equipment	1.0	2.33
394	Toys and sporting goods	1.0	2.33
399	Misc. manufacture	1.0	2.33

Memorandum

To : Regional and District Managers

Date : January 18, 1980

Subject:

From : Department of Industrial Relations,
Art Carter, Chief Carter
DOSH

During the training meeting on January 18, 1980, you are being provided with the Safety Data Base Inspection Scheduling System based on April - August 1979 data.

The attached User Guide prepared by the Division of Labor Statistics and Research describes the construction of this system. In addition, the User Guide, includes six criteria, which appear on pages 1 and 2, that specify the decision-making process that must be involved in developing plans to inspect firms. These criteria are based on a policy developed by Mike Schneider, Deputy Chief for Safety, and myself.

In order to make this User Guide a self-standing document, I requested of the Division of Labor Statistics and Research that the criteria for inspecting firms be included with the technical material described by the Division of Labor Statistics and Research.

C-16 in the Division's Policy and Procedure Manual will be revised to reflect these new criteria.

/jp

SURNAME

Form A 8-1001

TITLE INSTRUCTIONS FOR CAL/OSHA 12, SAFETY/HEALTH HAZARD REFERRAL P & P No. C-12

Page 1 of 2

Effective Date: March 1, 1979

POLICY

Safety hazards which cannot be evaluated by an Industrial Hygienist and health hazards which are beypnd the expertise of the Compliance Safety Engineer are referred to the proper health or safety office. Situations arise where uncertainty exists and a decision whether or not to refer the hazard must be made.

Below are general guidelines for determining the types of health hazards (from complaints or encountered during safety inspections) which are to be handled by safety engineers. Examples of health hazards that should be handled by safety engineers, and the types of health hazards that should be referred to industrial hygienists, are also given below. There may be some situations where it is difficult to determine whether the health hazard should be handled by the safety engineer or referred to the industrial hygienist; in these cases, the safety engineer should ask the District Manager to make the judgment. If the District Manager also has difficulty in making a determination, the District Manager should discuss and resolve the situation with the senior industrial hygienist. A referral to the industrial hygienist which is clearly a health hazard that could be handled by the safety engineer will be returned to the District Manager.

Hazards to be handled by the Compliance Safety Engineer:

1. Health hazards where compliance is determined by visual inspection and is within the expertise of the safety engineer; e.g., sanitation, approved personal protective equipment, toilet facilities, labeling, work practices, etc.
2. Health hazards resulting from mechanical failures and accidents; e.g., ruptured lines and tanks, and spills involving toxic chemicals. (It is generally not practical nor worthwhile to have an industrial hygienist evaluate and sample exposures from spills and leaks involving toxic chemicals.)
3. Health hazards where compliance is determined by measurements and evaluations within the capability of the safety engineer; e.g., ventilation rates of paint spray booths and laboratory hoods, illumination levels, steady noise, etc.
4. Health complaints which lack detail but indicate potential occurrence of illnesses or injuries. These complaints should be inspected first by the safety engineer and handled by the safety engineer if the complaint is within his expertise; if not, the complaint should be referred to the industrial hygienist with the safety engineer's initial inspection findings; e.g., complaints about exposures, without associated illness or injury, to irritating fumes, unknown chemicals, etc.

5. Hazards involving gases and substances where the main concern is fire or explosion. Although the industrial hygienist may be capable of measuring the concentrations of flamable gases and dust, these hazards should not be referred to the industrial hygienist.

Hazards to be referred to the Industrial Hygienist:

1. Complaints which allege illnesses and injuries from operations involving chronic exposures; e.g., silicosis, heavy metal poisoning, liver disease, etc.
2. Health hazards where compliance is determined by measurements and evaluations which are beyond the training and equipment capabilities of the safety engineer; e.g., impact noise, microwave radiation, exposures governed by GISO 5155, etc.

TITLE INSTRUCTIONS FOR CAL/OSHA 12, SAFETY/HEALTH HAZARD REFERRAL P & P No. C-12

Page 2 of 2

REFERRAL PROCEDURES:

Health or safety hazards encountered during an inspection that require specialized training or equipment to evaluate are referred to the proper office by use of the CAL/OSHA 12. A duplicate copy of the CAL/OSHA 12 is retained in the employer file as evidence of the referral.

The CAL/OSHA 12 will not be used for referring complaints to another office. See P & P C-7 for detailed instructions on referring complaints.

PROCEDURE FOR COMPLETING CAL/OSHA 12 BY CSE/IH:

REFERRAL DATA

Enter the name of the DOSH office that will be receiving the referral and the referral date. Include the name, office and telephone number of the CSE/IH referring the hazard. If the office has no Region/District designation, enter the name of the office.

LOCATION OF HAZARD

Record the necessary information and describe the specific location.

PERSONS TO CONTACT

Enter the name, title and telephone number of a management official and labor representative at the establishment.

DESCRIPTION OF HAZARD

Describe the hazard in detail and if applicable, the name of the chemical or substance.

The referral is to be reviewed and if approved, signed by the District Manager/Senior IH.

REFERRAL ACTION

This section is to be completed by the office receiving the referral. A priority is established by the District Manager/Senior IH and an inspection identification of the CSE/IH conducting the inspection is entered for reference purposes.

Attachment CAL/OSHA 12

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH

SAFETY/HEALTH HAZARD REFERRAL

REFERRAL DATA

REFERRED TO (Name of Office)			DATE REFERRED
REFERRED BY (Name of CSE/IH)	REGION	DISTRICT	PHONE NO.

LOCATION OF HAZARD

ESTABLISHMENT NAME				PRIMARY SIC ☐☐☐☐
ESTABLISHMENT ADDRESS	Street	City	Zip Code	☐ S - State L - Local P - Pvt. Indust.
LOCATION IN PLANT				

PERSONS TO CONTACT

MANAGEMENT REPRESENTATIVE	TITLE/AFFILIATION	PHONE NO.
LABOR REPRESENTATIVE	TITLE/AFFILIATION	PHONE NO.

DESCRIPTION OF HAZARD

APPROVED BY (DIST. MANAGER/SENIOR IH)

REFERRAL ACTION

ASSIGNED TO	DATE ASSIGNED
ASSIGNED BY	

IDENTIFICATION FOR REFERENCE

IDENT.	RPT. NO.	FY	PRIORITY HIGH	PRIORITY MED.	PRIORITY LOW
☐☐☐☐☐	☐☐☐	☐☐	☐	☐	☐

COMMENTS:

CAL/OSHA 12
MARCH 1978

STATE OF CALIFORNIA—AGRICULTURE AND SERVICES AGENCY
EDMUND G. BROWN JR., Governor

DEPARTMENT OF INDUSTRIAL RELATIONS
455 GOLDEN GATE AVENUE
SAN FRANCISCO 94102

ADDRESS REPLY TO:
P.O. Box 603
San Francisco 94101

SENATOR WILLIAMS, N.J.
JUN 16 PM 12 53

June 11, 1980

Honorable Harrison A. Williams Jr.
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Senator Williams:

Thank you for your letter of May 2, 1980, concerning my testimony before the Committee on Labor and Human Resources' OSHA Legislative Hearing of April 17, 1980. I appreciate very much the opportunity to provide additional information into the record on this critical issue.

Your questions are directed to our most serious concerns with the theory and approach of S.2153 as it would undermine our efforts in California to improve occupational health and safety. Our responses will follow the format of your questions.

QUESTION 1.A.

What other targeting approaches does Cal/OSHA use? How are they used? What is the source of the "other" data?

> As I stated in my testimony, many of our current techniques and means of targeting inspections would clearly lose their desired effect without necessary administrative flexibility.
>
> Cal/OSHA selects for inspection industries based on a number of critical considerations such as seasonal industry patterns; serious accident and injury experience suggesting prolonged and widespread safety and health problems; concentration of workers' complaints by industry or specific exposures; health hazard exposures unique to an industry; identification by medical staff of toxic substances; federal or state mandates; hazard alerts; etc.
>
> Our inspection of the cotton ginning industry in 1978 exemplifies a response to widespread hazards which are common to the industry yet seasonal in nature. A cotton gin task force was established to inspect approximately 45 gins in the San Joaquin Valley during the peak exposure period from September to November.

Prior OSHA experience indicated a number of safety hazards and violations frequently encountered in cotton gin operations resulting in a high rate of fatalities and amputations. Some of the more serious hazards included no guarding on belt drives, elevated platforms with no guard rails, unguarded compressers and shafts, exposed augers, and very poor maintenance. With respect to dust hazards, Cal/OSHA recognized the exemption of cotton gins from the recently adopted cotton dust standard and the need, consequently, for greater surveillance to ensure safe and healthy work practices. As for noise, Cal/OSHA determined the existing general industry safety order for noise requiring engineering controls to be difficult to sustain in these cases. Safety and health staff worked closely to determine the most appropriate sampling methods, applicable safety and health orders, and necessary compliance actions to eliminate hazardous conditions.

The results were impressive. After Cal/OSHA's Task Force began its inspection, cotton gin operators requested consultative visits. In 63 visits, consultants uncovered 420 violations, of which 160 were serious. Abatement was successfully accomplished in the majority of these cases.

Part of the success of this Task Force was due to the high competence and organization of teams of compliance safety engineers familiar with the unique hazards of cotton ginning and able to survey all gins with professional judgment.

Cal/OSHA has undertaken similar comprehensive task force efforts in high hazard industries such as construction and the refineries. A Construction Task Force was set up in 1978 to concentrate on the booming construction industry in Orange County which produced an immediate backlog of uninspected construction sites. The lack of worker complaints, frequent abuse by subcontractors of accelerated work schedules, and the general lack of presence of Cal/OSHA because of the prior shortage of staff attached to that office combined to increase risks and encourage reckless work practices at these sites.

In addition, the Construction Task Force produced greater efficiency due in part to greater expertise and hazard recognition by studying an entire industry and its known hazards. These included many serious and unrecognized health and safety problems such as the uncontrolled use of asbestos in plastering, an absence of required permits for construction, excavations, and other high risk operations.

Equally important was the discovery of the prevailing poor attitude toward occupational safety industry-wide caused by the demanding production schedule, lack of prior inspections by OSHA, wide use of subcontractors and reliance on the general contractor ("subs cannot control other subs"), and lack of complaints in part due to piece work rates among certain crafts of construction workers. The Task Force's success can be summed up in its inspection/violation results: of 89 inspections, 195 general/regulatory violations, 19 serious, and 6 repeats were noted; and only 18 inspections were found in compliance.

In the garment industry, fewer imminent hazards were anticipated, but a host of unregulated or underregulated conditions existed as a result of multiple health and safety jurisdictions, unknown and uninspected sweat shop conditions. Cal/OSHA's decision was to assist Los Angeles County officials and other state agencies mindful that working conditions for many garment workers had not significantly changed since the turn of the century, and that Los Angeles' booming garment industry was also subject to continued threats of industry flight to Korea, Southeast Asia, and Latin America. These shops had not been inspected by Cal/OSHA (nor by other county and local health agencies); consequently, OSHA posters were not found and accident recordkeeping practically non-existent.

Cal/OSHA's Garment Industry Task Force uncovered numerous hazardous conditions throughout the industry. Many citations were issued covering unguarded machinery, various electrical hazards, blocked aisles and exits, unsanitary toilet facilities, inadequate fire protection, rodent feces and urine, rats and cockroaches in the workplace. This series of investigations was culminated by the District Attorney's office initiating prosecutions of certain garment employers for serious health, safety, and labor violations.

In addition to the self-initiated enforcement actions described above, we rely to a considerable extent on a pattern of worker complaints to target additional inspections based on known or strongly suspected hazards in specific industries. These complaints often describe with unique specificity particular safety and/or health problems and result in inspections which often exceed the scope of the initial complaint which triggered the inspection. (Please refer to our response to Question 4.)

A classic example is the inspection of the Texaco refinery located in El Segundo which resulted from two worker complaints, and led to a six-month wall-to-wall inspection, revealing a multitude of health and safety problems and prompting referrals to industrial hygienists and structural engineering specialists.

The history, frequence, and severity of accidents and injuries to workers in the chemical and refinery industries have also been important factors in our targeting of inspections. The convergence of worker complaints and accident history point out common, generic safety and health hazards which exist throughout the particular industries, and are not unique or limited to individual work sites.

As such, partial plant by plant inspections are neither appropriate nor efficient as compliance generally requires engineering control or design changes, equipment modifications, worker education and training programs, new safety and health regulations or standards applicable for much, if not all, of an industry.

In addition, we have targeted inspections in response to state and federal agency directives such as Federal OSHA Alerts, NIOSH industry-wide studies, and other health and safety studies which identify specific hazards and require prompt investigation of California workplaces. Early identification by our medical staff of specific effects of toxic substances such as DBCP have lead to inspections of many facilities (e.g. formulators, port and railway facilities, warehouses, users, etc.). Federally mandated programs, such as OSHA's Pesticide Emphasis Program, led to a widespread and extensive inspection by our staff, of numerous pesticide formulation plants in California. This emphasis program required air sampling, and other monitoring, as well as medical history questionnaires to uncover health effects common to workers throughout the pesticide industry. Such effects would neither be evident nor statistically accurate if based solely on simple plant inspection records.

Finally, recognition of high hazard and prolonged exposures unique to certain complex industries such as lead battery and electronics have resulted in extensive inspections by Cal/OSHA. The electronics study is under way and will undoubtedly reveal many serious health and safety hazards characteristic of the entire industry, and will suggest needed standards and other protective measures. Most of our knowledge of health warning signs in these industries have come from Cal/OSHA compliance safety engineers responding to other complaints or accidents that were usually non-health related.

QUESTION 1.B.

How long has California been using workers' compensation data as an OSHA targeting device?

In July 1977, we initiated a pilot program based on workers' compensation data. This program was based on manufacturing industries only and derived from two months experience (lost workday records) in the previous year. We modified and expanded the pilot program in August, 1978, to include all industries, but it was still based on one months' workers' compensation data of 1977. On the basis of these two pilot programs, we determined to include in future data bases only the top half of the industries ranked according to a hazard index that we developed.

The data base inspection list that is currently being used by Cal/OSHA safety enforcement personnel was derived from a six-month workers' compensation data list of 1979. We have not had sufficient time to thoroughly evaluate the effectiveness of this system of targeting; however, based on preliminary information from field personnel and inspection records, we feel it is a step in the right direction. As we have already stated, our use of the data base is still in a developmental stage with much room for improvement and need for coordination with the other equally important targeting indicators described above.

QUESTION 2.

How does Cal/OSHA identify contractors performing work at the premises of another, primary employer?

These contractors most often come to our attention through accident investigations. We have no way of knowing before accidents occur who these workers are, where they work, what prior hazard recognition training and education they have had, what information and necessary protective equipment they have been provided as to the specific conditions and potential hazards at the primary employer's work site. Based on accident investigations following deaths or serious injuries to these subcontractors' workers, we can attest to the appalling lack of appropriate instruction in hazard recognition by both the contractor and their workers. The lack of protective equipment, and the necessary training in accident prevention for these employees by either the primary employer or contractor continues to be a major obstacle toward lowering the accident rate. At this time, only industry-wide targeting by compliance personnel has any effect toward recognition of Cal/OSHA regulations.

As I stated in my testimony, the injuries of subcontractors' employees only appear under the subcontractor, and never appear in the primary employer's injury records. But because the site of the accident is generally a primary employer, their low accident/injury base would therefore not appear on the safety data base for scheduled inspection. The maintenance company may, on the other hand, appear on the data base, if its incidence rate is sufficiently high.

It is, however, extremely difficult, if not impossible, to know in advance where these companies are apt to be working. Many of these contractors work throughout the state. Additionally, the workforce is also mobile and transient, remaining only for brief durations at various worksites until specified jobs are completed, e.g., insulation, leak repair, and maintenance. To illustrate the problem, we can point to a number of contractor firms such as

Coastal Engineering Company, headquartered for data base purposes in Bakersfield, California, but whose work is all over the state. Santa Fe Engineers, a general building contractor located in Taft, California, sends employees to work in refineries throughout the state. Timec Corporation, headquartered in Los Angeles and Bakersfield, has contracts to work in most of the San Francisco Bay Area refineries as well as Bakersfield, San Bernardino, and out-of-state. Where could we possibly send Cal/OSHA inspectors in these cases?

We have countless accident and fatality reports after the fact which indicate the identity and location of the contractor. Yet this information is a minimal value in preventing future accidents because these contractors have little or no control over critical work practices at the primary employer's site.

QUESTION 3.

How is California's Permit System used to identify hazardous operations for OSHA enforcement activity?

California has identified those types of employment which, historically by their nature, involve substantial risks of death or severe injuries. The permit system has been particularly important in preventing hazardous conditions as well as in compliance activities.

Under current California law, three types of activities require permits:

1. trenching or excavation work which will be five feet or deeper in which a worker may be required to work.
2. the construction of any building, structure, scaffolding, or falsework more than three stories high; and
3. the demolition of any building, structure, or the dismantling of falsework or scaffolding more than three stories high.

Both construction and demolition have had, and unfortunately continue to have, extremely high rates of serious accidents such as amputations, crushing, and fatalities.

The permit system serves as a good screening process which requires employers to describe the potential risks and specific measures to minimize the risk of workers. It gives Cal/OSHA a vital means to review engineering plans, and encourages the employer to have a pre-job safety conference to discuss the proposed activity in terms of intended work practices, protective equipment, hazard recognition, accident training and education program. As a screening practice, permits allow OSHA to direct manpower where it is most needed, e.g.

if an employer files for a permit and has a poor prior accident history, we can investigate all aspects of the job before it's commenced. This review may include asking the employer for any relevant information such as prior citations, training program, and specific work practices (e.g. the rate of pouring cement on a cooling tower and the size and strength of scaffolding), protective equipment which may be necessary to ensure workers' safety.

Currently 25% of all permits are reinspected at some future date which provides an opportunity to again ensure compliance with all safety requirements.

As noted in my testimony, permits have substantially helped reduce construction fatalities (by 40%) and mine explosion fatalities (by 35%). The value and effectiveness of the pre-job conference in these high hazard operations cannot be over-emphasized.

QUESTION 4.

On what administrative bases does Cal/OSHA determine the extent of a complaint inspection?

In general, we allow our compliance management and field personnel discretion in determining the extent of the inspection based on the following factors:

1. On-site visual inspection, general conditions, and hazards noted by the safety engineer, workers' comments.
2. Previous history of employer including accident history, severity and frequency of past citations, training and education programs, illness and injury records.
3. Safety Data Base information on employer, including Preventable Incidence Rate (PIR) information for the employer's industry (from Safety Data Base).
4. Specifics alleged in complaint and additional complaints from employees and their representatives alleging hazards not included in initial complaint.
5. Date of last survey, if any, and results.
6. Entry-search warrant problems; willingness of company to allow OSHA inspection. Difficulties of entry and need for warrant may encourage more comprehensive searches beyond initial complaint based on actual conditions at the particular place of employment.
7. Presence and frequency of use of subcontractors, e.g., in refineries, chemical plants, construction.

8. Specific types of machinery and work procedures which are particularly likely to cause serious risk of injury.

In addition, much is left to the professional judgment of the District or Regional Manager and the expertise of the field staff at the worksite. In the highly hazardous oil refineries, it has been necessary and extremely beneficial to expand the scope of the inspection because of the complexity of the operation (machinery, chemical exposures, multiple aspects of operation), and frequent reliance by industry on independent subcontractors for many of the most hazardous maintenance activities.

The Texaco case exemplifies the need for continued flexibility and discretion based on the professional judgment of OSHA's field staff and managers.

Initial inspection of the original worker complaint (use of breathing apparatus and probable exposure to asbestos) led to a broader inspection of breathing apparatus elsewhere in the refinery to eliminate similar risks. During the course of the on-site investigation, Cal/OSHA's safety engineer noted many unsafe conditions in plain view and heard directly from workers about other hazards which could have likely caused a major explosion.

Based on all these factors, both the district and regional manager agreed that a wall-to-wall inspection of the refinery was warranted. The extensive, six-month inspection revealed an unprecedented number of serious, willful, and general/regulatory violations for safety and health problems, including unguarded machinery; serious carcinogen violations concerning clean-up, removal, and labeling of asbestos; lack of guardrails; unadjusted pressure in boiler; unguarded pipes and extremely hot surfaces; lack of identification of hazardous substances transported in piping system; numerous electrical problems.

The expanded investigation not only prevented a probable and grave accident at Texaco, but also suggested the urgent need for a statewide refinery task force to check on similar safety and health hazards. For example, the Texaco inspection revealed the potential of structural inadequacies of existing piping and storage tanks to handle the new, high sulfur content (and concomitant corrosibility) in oil processed in California refineries.

We would also be likely to expand an inspection beyond an initial limited complaint in the area of manufacturing processes which utilize particularly unsafe machinery such as punch presses, sawmills, and other wood product operations. These types of machinery, combined with typical work practices in these industries, have historically caused serious worker injuries and deaths.

QUESTION 5.

Explain the operation of the experimental self-enforcement program at San Onofre, California.

This self-enforcement program was negotiated in concert with Bechtel Power Corporation, the National Constructors Association, and the California Building and Construction Trades Council.

It was designed to reduce government's role in the work place and to better allocate the time of Cal/OSHA compliance personnel. This agreement applies only to the San Onofre Nuclear Generating Stations Two and Three (SONGS 2 and 3) which are presently under construction.

Under this program, job safety and health inspections are handled by a joint employer-labor committee representing the Bechtel Power Corporation and its subcontractors. This committee, comprised of two employee and two employer representatives conducts project-wide inspections on a monthly basis. This committee also holds weekly meetings to review actions taken by management on safety and health problems.

All worker rights embodied in the Cal/OSHA program remain in full force during this agreement. Employees are encouraged to file complaints with the contractor's safety department. This is ususally done as a follow-up to a verbal notification given to the responsible personnel. Employees at all times retain the right to complain to Cal/OSHA, ask for an inspection of safety and health problems, and be included in a walk-around.

Monitoring of the agreement is the resposibility of one specifically designated Cal/OSHA compliance officer (DCO). The DCO must notify the Bechtel project safety department upon entering the project, but he is not required to hold a formal opening or closing conference. He is available for discussions and/or filing of complaints by employees, and has a responsibility to keep in contact with job stewards as well as employees in the area.

As we had hoped, most complaints have been reported directly to the prime contractor and handled successfully by the Safety Committee.

This experiment will be evaluated according to the following criteria:

1. The impact of the voluntary program on the injury rate at SONGS 2 and 3. It is anticipated that a voluntary approach to control hazards on an ongoing basis may reduce on-the-job injuries.
2. The potential for reduction of Cal/OSHA inspection costs, particularly through eliminating complaint inspections. In the period immediately preceding the voluntary self-inspection program, compliance staff responded to a number of complaints in which no violation was found and no citation was issued.
3. The effectiveness of the job-site committee in performing on-site inspections and controlling hazards.
4. The value of the voluntary program in reducing workers' compensation insurance costs.

More detailed information is contained in the attached Cal/OSHA change supplement which was submitted to and approved by Federal OSHA.

QUESTION 6.

What were the circumstances at San Onofre which led us to believe that a self-enforcement experimental project would be possible there?

1. A joint request by the California State Building and Construction Trades Council, AFL-CIO, and the National Constructors Association on behalf of Bechtel Corporation. Various other building trade unions and subcontractors were also supportive of this pilot project.
2. A solid commitment by Bechtel Corporation to cooperate fully in the implementation of a program was made credible by the company's prior history and good faith in abating unsafe conditions and operating health and safety committees in an effective manner.
3. An injury and illness rate substantially below that of the over-all industry.
4. Knowledge and confidence by Cal/OSHA of the actual circumstances at San Onofre which indicated a good working relationship between labor and management.

In general, we feel that this experimental project has very limited direct application to other workplaces. Some of the minimum circumstances necessary to duplicate the San Onofre experiment elsewhere would include the following:

1. The employer is required to have maintained injury and illness and compensation rates significantly less than the average for that industry.
2. The employer will apply contractual language in order to maintain the same compliance with subcontractors employed by them.
3. The employer has a signed contract with a recognized labor organization which is in full agreement with the concept of a self-enforcement program.
4. The employer has a full-time staff of safety and health professionals evaluated by Cal/OSHA who have previously demonstrated the ability and willingness to correct hazards.
5. The employer will expand the scope of employee hazard recognition training upon tri-partite consultation with labor and Cal/OSHA. The employer has a program for the training of new hires which includes a safety and health awareness about the entire facility where the employee works.
6. The employer does not discriminate, in so far as safety and health conditions may apply, between the hiring or maintenance of employment of any person because of sex or racial characteristics.
7. Both management and labor have agreement on the composition, structure, role and functioning guidelines of a health and safety committee. At minimum, such committee shall have equal representation of elected employee representatives.
8. The health and safety committee shall have equal representation of labor and management, with labor's participation counting for paid "on the clock" time.
9. All members of the committee will have access to all pertinent production, technical, and medical information held by either party including medical records, safety and health logs, sampling results, etc.
10. The committee shall have regular meetings with written minutes and authority to make actual operational and design decisions.

I wish to thank you again for this opportunity to provide the Committee with our insights and experience concerning these important issues. If I may be of further assistance, please do not hesitate to contact my office.

Sincerely,

Donald Vial

Donald Vial, Director
Department of Industrial Relations

/jp
cc: Dr. Eula Bingham
Art Carter

SAFETY & HEALTH INSPECTION GUIDELINES

As a general rule a wall-to-wall survey of the place of employment is made whenever a complaint is investigated. However, the District Manager/Senior IH and CSE/IH have discretionary control in determining the necessity for this type of survey and shall use the following guidelines in making a final decision as to whether a wall-to-wall or partial survey is to be conducted.

The District Manager/Senior IH shall consider the following when determining the need for a wall-to-wall or partial survey:

1. Previous history of the employer.
2. Safety Data Base information. (Safety)
3. Preventable Incidence Rate (PIR) information for this industry.(Safety)
4. Workload.
5. The items complained about: i.e. Are they of a serious or general nature?
6. Date of last survey: Normally, only a partial survey would be conducted if a wall-to-wall had been done within the past year.

The CSE/IH will consider the following even though assigned to do a wall-to-wall or partial survey.

1. General appearance of the place of employment with respect to safety and health.
2. Comments relative to safety and health problems made by employees or their representative during the initial phases of the survey.
3. Review of the employer's Log of Occupational Injuries and Illnesses.
4. Any obvious or apparent change in machinery or processes.

If upon review of the preceding items the CSE/IH does not feel that the proper assignment was made, he may change this assignment but must support his reason for doing so in Item 29 of the CAL/OSHA 1. The CSE/IH should contact the District Manager/Senior IH if a change is necessary in assignment, prior to finishing (Closing conference) the inspection.

Revised 3-1-79

State of California

Occupational Safety and Health Plan

CHANGE SUPPLEMENT*

Number: 22

Date: January 14, 1980

Resulting from:

☐ Developmental Change

☐ Federal Program Change

☐ Evaluation Change

☒ State-initiated Change

Subject: Voluntary Compliance Agreement

I. PURPOSE OF SUPPLEMENT

The purpose of this Change Supplement is to document the development of a Job Site Voluntary Self-Inspection Program which has been implemented at the San Onofre nuclear generating station construction site. An agreement negotiated with Bechtel Power Corporation, the National Constructors Association and the California Building and Construction Trades Council with the approval of CAL/OSHA provides for a joint labor-management committee to be responsible for safety and health inspections at the site. (See Exhibit I.)

OSHA personnel from the National and Regional offices also were involved in the extensive negotiations to draw up the agreement and were present at the ratification ceremony. Implementation of the pilot program began in March 1979.

II. BACKGROUND

The California Occupational Safety and Health Plan provides for enforcement of standards by compliance staff in the Division of Occupational Safety and Health. Most inspections are made on the basis of accident investigations, employee complaints of unsafe conditions, scheduled inspections of high-hazard industries, and follow up on prior inspections. The voluntary compliance project is a demonstration of a new policy approach to reduce government's role in the workplace and to better allocate time spent by CAL/OSHA inspection staff. The approach is designed to test the concept that labor and management can work together under established criteria to achieve a high level of safety and health without the need for compliance inspections by CAL/OSHA.

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*As required by 29 CFR 1953.

A somewhat different approach to voluntary compliance had been used in the California particleboard industry in 1976. The Division had "yellow tagged" a number of particleboard plants after an explosion of combustible dust destroyed a particleboard plant and killed seven workers. The control of dust is an ongoing problem in the industry, and it is difficult to judge the amount of dust sufficient to constitute a real hazard. Since conditions can change rapidly, it is not feasible to monitor dust levels on a continuous basis through routine compliance inspections.

In order to avert a recurrence of the disastrous explosion, the California particleboard industry agreed to establish accident prevention programs and to submit individual plans for each plant to the Division of Occupational Safety and Health. With the voluntary cooperation of the industry, preventative measures to reduce dust at the source and methods to control dust on a continuous basis were developed, and the plants were allowed to reopen. Plants are reinspected periodically by the Division to determine whether companies are adhering to voluntary compliance agreements, and citations are written for violations found.

Following the success of the voluntary compliance efforts in the particleboard industry, CAL/OSHA gave consideration to instituting voluntary compliance agreements in other appropriate industries. The construction industry was an obvious choice. Since conditions in the construction industry change almost daily, it was reasoned that ongoing inspections by persons on a project site might prove to be more effective than periodic visits by CAL/OSHA staff. Employer representatives and union personnel at the job site could act quickly to eliminate potential safety and health problems. In addition, it should be possible for nonserious complaints to be handled by a job-site committee without necessitating an inspection. A job-site voluntary self-inspection program also would provide a means to deal with behavioral problems that constitute the basis for a large number of job-induced injuries, as well as to control hazards on an ongoing basis.

Selection of the San Onofre project for the pilot voluntary compliance program was based on the fact that the contractor had an injury rate significantly below the State average for the construction industry and had a good safety record as documented by CAL/OSHA. The one-year pilot program is designed to test the effectiveness of voluntary compliance. If the pilot program is successful, voluntary compliance agreements may be adopted at other construction sites in California.

III. IMPLEMENTATION

The voluntary compliance agreement covering the San Onofre Nuclear Generating Station Units Two and Three (SONGS 2 & 3) is the first such agreement in the United States which provides that worker safety and health inspections will be suspended for the duration of the project. CAL/OSHA retains the authority to issue citations and will monitor the effectiveness of the joint labor-management efforts in controlling workplace hazards. However, no routine compliance inspections will be conducted during the one-year experimental program.(See Exhibit 2.)

Job-site Committee

The agreement signed by the parties in March, 1979 provides that job safety and health inspections covering Bechtel Power Corporation and all of Bechtel's subcontractors at the SONGS 2 & 3 site will be the responsibility of a joint employer-union committee representing the prime contractor and the unions. The voluntary compliance agreement does not affect other prime contractors not under the control of Bechtel Power Corporation, or any work or activity that is related to SONGS 2 & 3 but takes place outside the SONGS 2 & 3 site. These activities remain under regular CAL/OSHA jurisdiction and are not covered by the voluntary compliance agreement.

The job-site committee comprised of two employee representatives, and two employer representatives,including the employer's safety representative,conducts a project-wide inspection on a monthly basis. The committee forwards compliance inspection reports noting violations of CAL/OSHA standards to management and reviews corrective actions taken. The committee holds weekly meetings to review actions taken on safety problems by management.

Employee Protection

All of the worker rights embodied in the California Occupational Safety and Health Act of 1973 remain in force during the voluntary compliance agreement. Employees were originally notified of the program through printed notices and tool box safety meetings, and the program is discussed periodically in safety meetings. Employees are encouraged to file complaints with the contractor's safety department on a "Report of Safety Problem" form provided by the prime contractor for that purpose. The form is designed for use after the problem has been called verbally to the attention of responsible personnel. However, employees retain the right to file a complaint with CAL/OSHA.

Monitoring by CAL/OSHA Personnel

There will be no scheduled inspections by CAL/OSHA at SONGS 2 & 3 during the one-year pilot program. Only one compliance officer is authorized to enter SONGS 2 & 3 except in case of emergency or as specifically authorized by the Chief, Division of Occupational Safety and Health. The designated compliance officer may walk around the project with labor and management representatives for the purpose of monitoring the program and handles all matters relating to CAL/OSHA.

The designated compliance officer must notify the project safety department when entering the site but is not required to hold formal opening and closing conferences. He notifies management as to the area of the site he wishes to visit, and management decides whether or not to accompany him. During site monitoring, the designated compliance officer has a responsibility to talk to employees and job stewards in the area. If an employee wishes to file a complaint, he explains the voluntary process, but is prepared to handle the complaint if the employee prefers to file with CAL/OSHA.

The designated compliance officer maintains accurate and descriptive field notes. He keeps in contact with the SONGS 2 & 3 safety department and with representatives of the building trades unions as required to maintain effective communication. In addition to site monitoring, the officer attends some of the tailgate safety meetings conducted by management and reviews the minutes of the job-site committee and the injury and illness logs required by CAL/OSHA. A monthly report is submitted to the Chief of the Division of Occupational Safety and Health.

To clarify some procedures not covered in the agreement,the designated compliance officer met with officials of Bechtel Corporation in August, 1979 to discuss actions to be taken when a serious safety violation was observed during a walk-around inspection. Bechtel was advised that the designated compliance officer would break off his advisory role and handle the situation as a complaint of a serious nature.

Handling of CAL/OSHA Complaints

As anticipated, most complaints are reported directly to the prime contractor and are handled by the prime contractor with review by the job-site committee. Complaints filed with CAL/OSHA are screened by the designated compliance officer, who telephones nonserious complaints to the SONGS 2 & 3 safety department. CAL/OSHA tracks each complaint that is referred and may issue citations if the problem is not handled in a timely fashion.

Serious CAL/OSHA complaints and complaints of imminent danger are handled immediately by the designated compliance officer according to regular CAL/OSHA policies and procedures.

Evaluation of Effectiveness of the Program

The following measures will be used to evaluate the effectiveness of the program:

1. The impact of the voluntary program on the injury rate at SONGS 2 & 3. It is anticipated that a voluntary approach to control of hazards on an ongoing basis may reduce on-the-job injuries.

2. The potential for reduction of CAL/OSHA inspection costs, particularly through eliminating complaint inspections. In the period immediately preceding the voluntary self-inspection program, compliance staff responded to a number of complaints in which no violation was found and no citation was issued.

3. The effectiveness of the job-site committee in performing onsite inspections and controlling hazards.

4. The value of the voluntary program in reducing workers' compensation insurance costs.

A meeting was held at the SONGS site on October 2, 1979 to review the program after seven months of operation. Representatives from CAL/OSHA and Federal OSHA as well as representatives of Bechtel, the State Building and Construction Trades Council and the National Constructors Association were in attendance. Several recommendations have been made as a result of this review. It was agreed that CAL/OSHA would furnish instructors to train the self-inspection committee in hazard recognition and that any area of expertise not available from CAL/OSHA would be provided by Federal OSHA. CAL/OSHA also agreed to review the frequency of visits made by the designated compliance officer.

Exhibit 1
Page 1 of 6

NATIONAL CONSTRUCTORS ASSOCIATION/
CALIFORNIA BUILDING & CONSTRUCTION TRADES COUNCIL
JOINT VOLUNTARY CAL/OSHA SELF-INSPECTION PROGRAM
for the
San Onofre Nucelar Generating Station, Units 2 & 3
at
San Clemente, California

Introduction

It has been shown that governmental inspection/enforcement programs alone are not effective in reducing job injuries and illness; hence, a significant percentage of such occurrences are not inspection preventable by routine compliance inspections.

Therefore, The National Constructors Association/The California Building & Construction Trades Council have jointly agreed to a pilot program which will enable a joint Labor/Management Committee, comprised of persons employed on the project, to function in such a manner so as to provide a continuing assurance that compliance with the Cal/OSHA Construction Safety Orders is maintained.

Voluntary Self-Inspection Program

The purpose of the jobsite committee is to assist the employer, as required, in the implementation of the Voluntary Self-Inspection Program. The committee will function as outlined below. The committee's activities will be monitored by the National Constructors Association/California Building and Construction Trades

Exhibit 1
Page 2 of 6

Council Joint Committee on Voluntary Self-Inspection.

Organization of Jobsite Voluntary Program Safety Committee

1. A four-member committee, comprised of two employer representatives and two employee representatives will be established.
2. All committee members must be current employees on the project.
3. All employee committee members will be appointed by the local Building Trades Council having jurisdiction.
4. Employee committee members may not be union stewards.
5. Employer members shall have field supervisory responsibility excepting the employer Safety Representative who shall be a permanent member of the committee.
6. Committee members will be permitted to perform committee business.
7. Participation on the committee shall not preclude discharge for cause or reduction in force for valid reasons. Participation on the committee does not guarantee continued employment.

Functions of the Jobsite Committee

1. The committee shall meet on a weekly basis at a time and place agreed by the membership.
2. The committee will assist in the implementation of the Voluntary Self-Inspection Program at the SONGS 2 & 3 site.

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STATE OF CALIFORNIA
STD. 113 (REV. 8-72)

Exhibit 1
Page 3 of 6

3. As an adjunct to the on-going safety programs, the committee shall conduct inspections to assure continuing compliance with the Cal/OSHA Construction Safety Orders. General (project-wide) inspections shall be conducted on a monthly basis. Other inspections will be conducted as required by committee action. The abatement measures taken on violations noted during inspections will be reviewed by the committee.
4. The committee shall review all Report of Safety Problem forms submitted by employees to the contractor's safety department since the last meeting. The follow-up action taken by the employer will be reviewed by the committee.
5. Other outstanding or unsolved safety matters relating to compliance with the Cal/OSHA Construction Safety Orders will be considered.
6. Minutes will be kept of each committee meeting.

Notification of Voluntary Self-Inspection Program to Project Employees

1. Current employees will be advised through a printed notice disseminated to each employee at the tool box meeting prior to the effective date of the program. The program will be the principal topic of this meeting.
2. New hires will be given a printed notice at time of hire. The Voluntary Self-Inspection Program will be discussed thoroughly at the new hire safety orientation meetings.
3. Copies of the printed notice will be posted in conspicuous locations.

Exhibit 1
Page 4 of 6

4. The program will be discussed periodically in all safety meetings.
5. The function of the program will be reviewed with each newly assigned foreman and superviser.

Monitoring of Voluntary Self-Inspection Program

1. The National Constructors Association/California Building and Construction Trades Council Joint Committee will monitor the implementation of the Voluntary Self-Inspection Program through periodic on-site audits of the jobsite committee's activities.
2. Cal/OSHA will monitor the program through periodic on-site audits by designated personnel.

Documentation of Committee Activities

1. Minutes will be kept of each meeting.
2. Compliance inspection reports, noting violations of Cal/OSHA Safety Orders will be forwarded to management for review and action as necessary. Corrective actions/abatements will be reviewed by the committee.
3. Report of Safety Problem forms submitted to the Safety Department will be reviewed.

Notice of Safety Problem Form

This procedure is intended to be utilized after a verbal notification of the alleged problem/condition has been made to responsible personnel, or when extenuating circumstances exist.

Exhibit 1
Page 5 of 6

1. Copies of the Notice of Safety Problem will be available in the Safety Department, in the change rooms, and from craft stewards.

2. The notice will be logged in upon receipt, reviewed by the Safety Department, appropriate action taken, and the results documented.

3. Those employees who elect to identify themselves will be advised of actions taken.

4. The jobsite committee will review all Notice of Safety Problems received by the Safety Department.

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STD. 113 (REV. 8-72)

Exhibit 1
Page 6 of 6

REPORT OF SAFETY PROBLEM

Date____________

1. The item(s) addressed in this report have been brought to the attention of:

   a. Foreman/General Foreman Date__________
   b. Superintendent Date__________
   c. Safety Department Date__________
   d. Shop Steward Date__________

2. Description of problem (including exact location):

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3. Safety Department Findings:

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4. Actions Taken:

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5. Reviewed by Jobsite Committee:

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Submitted By(optional) ____________________ ____________
Name Craft

Exhibit 2

Page 1 of 8

STATE OF CALIFORNIA
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
VOLUNTARY SELF-INSPECTION SAFETY PROGRAM
SAN ONOFRE NUCLEAR GENERATING STATION, UNITS TWO & THREE

Special Policies and Procedures

Scope

The Division of Occupational Safety and Health (DOSH) has entered into an official voluntary compliance agreement with the National Constructors Association (NCA) and the California Building and Construction Trades Council to test an experimental safety and health program at selected NCA member construction projects in California. This experimental program is known as the Voluntary Self-Inspection Safety Program. The initial construction project selected for this program is the San Onofre Nuclear Generating Station Units Two and Three, hereinafter called SONGS 2 & 3. This project is located at San Clemente, California. The prime contractor is Bechtel Power Corporation, with headquarters in San Francisco.

In this voluntary self-inspection program, Cal/OSHA will cease all routine compliance inspections at the SONGS 2 & 3 site. Additionally, Cal/OSHA will screen all complaints and refer those complaints which it considers to be of a non-serious nature to a labor-management committee at the site for investigation and appropriate action. Serious complaints will be handled by regular Cal/OSHA procedures.

Exhibit 2
Page 2 of 8

NCA and the California Building and Construction Trades Council have signed a special labor-management agreement which creates a Job-site Voluntary Program Safety Committee and a detailed procedure for assuring compliance with the Cal/OSHA safety orders.

The policies and procedures that follow here apply only to the SONGS 2 & 3 project. Specifically, these policies and procedures cover Bechtel Power Corporation, all of Bechtel's subcontractors at the SONGS 2 & 3 site, and all management and hourly employees working for either Bechtel Power Corporation or Bechtel's subcontractors at the SONGS 2 & 3 site. It is important to note that any work or activity related to SONGS 2 & 3 that takes place outside SONGS 2 & 3 site is not covered by these policies and procedures. These policies and procedures are also not applicable to other prime contractors at SONGS 2 & 3 which are not under the control of Bechtel Power Corporation. In other words, all work that either takes place outside the SONGS 2 & 3 site or is not under the control of the Bechtel Power Corporation at the SONGS 2 & 3 site remains under regular Cal/OSHA jurisdiction and should be handled according to regular Cal/OSHA policies and procedures.

Purpose

This Voluntary Self-inspection Safety Program is based on the concept that labor and management, working together on projects meeting established criteria, can achieve a high level of occupational safety and health without the need for routine compliance inspections by Cal/OSHA.

Exhibit 2
Page 3 of 8

The measures of effectiveness that will be evaluated in the course of this experimental project are:

1) The impact of the voluntary program on the injury rate at SONGS 2 & 3.

2) The potential for reduction of Cal/OSHA inspection costs.

3) The effectiveness of the jobsite committee.

4) The value of the voluntary program in reducing workers compensation insurance costs.

The voluntary self-inspection program at SONGS 2 & 3 does not change or nullify any of the existing federal or state job safety and health laws or regulations. Cal/OSHA standards, and all of the worker rights embodied in the California Occupational Safety and Health Act of 1973, remain in force. The methods of Cal/OSHA differ at SONGS 2 & 3 in two respects only: First, only one Designated Compliance Officer, hereinafter termed the DCO, is authorized to enter the project. Second, the published policies and procedures which normally guide the Cal/OSHA compliance officers are slightly modified for the SONGS 2 & 3 project. These modified policies and procedures appear in the following paragraphs.

Entry to the SONGS 2 & 3 Project by Cal/OSHA Personnel

Only one compliance officer, the DCO, is authorized to enter SONGS 2 & 3 to monitor the effectiveness of the voluntary self-inspection safety program and to handle all matters involving Cal/OSHA. Other members of the Cal/OSHA staff may not enter the

Exhibit 2
Page 4 of 8

project unless they are specifically authorized by the Chief of DOSH or are responding to an imminent danger or other emergency that cannot be handled by the DCO. In any case of emergency involving SONGS 2 & 3 where the DCO is not immediately available, the DOSH District Manager will authorize entry to the site.

Routine Compliance Inspections

There will be no scheduled inspections by Cal/OSHA at SONGS 2 & 3. Scheduled inspections have been eliminated in favor of the self-inspection program described in the attached labor-management agreements. The DCO, however, may walk around the project in the company of labor and management representatives for the purpose of monitoring the voluntary program.

Handling Cal/OSHA Complaints

Employees at the SONGS 2 & 3 project continue to have the right to file complaints to Cal/OSHA alleging safety and/or health hazards. It is expected that the number of these complaints will be small, because a special education program will encourage employees to use internal forms (Report of Safety Problem) provided by the prime contractor at SONGS 2 & 3. These forms will be acted upon by the prime contractor, with review by the Jobsite Voluntary Program Safety Committee.

All Cal/OSHA complaints originating from the SONGS 2 & 3 project shall be forwarded through the San Diego District Manager to the DCO. These complaints will be screened by the DCO and complaints alleging a non-serious condition will be logged and

Exhibit 2
Page 5 of 8

telephoned immediately by the DCO to the SONGS 2 & 3 Safety Department. In this process, the anonymity of the complainant shall be strictly protected.

The DCO will follow up the telephone communication by mailing a photocopy of the complaint to the SONGS 2 & 3 Safety Department with a copy to the Project Manager. In photocopying the complaint, the anonymity of the complainant shall be protected by blanking all identifying information on the original complaint before photocopying.

The DCO will track each complaint that has been transmitted to the SONGS 2 & 3 Safety Department. If the problem is not corrected in a timely fashion, the DCO will bring this information directly to the attention of the Project Manager. If the problem is not resolved at this level, the DCO will contact the Deputy Chief of DOSH for authority to issue citations as may be required.

Serious Cal/OSHA complaints and complaints of imminent danger shall be handled immediately by the DCO according to regular Cal/OSHA policies and procedures.

Receiving Complaints While at the SONGS 2 & 3 Site

In the course of an inspection, or during monitoring of the voluntary program,the DCO should be prepared to handle problems brought to his/her attention by the construction workers. These problems should be recorded in the DCO's field notes. Additionally, the DCO should speak privately with the complainant, and explain the voluntary jobsite program as well as the regular

Exhibit 2
Page 6 of 8

worker right to lodge a complaint with Cal/OSHA. The worker should be encouraged to use the voluntary process, but the DCO must be prepared to provide each worker with his/her right to bring hazards to the attention of the DCO and to have these hazards dealt with promptly and effectively according to Cal/OSHA law.

Opening and Closing Conferences

The DCO will be required to be present at the SONGS 2 & 3 site for two reasons: to monitor the voluntary program and to conduct compliance inspections triggered by serious complaints. When entering the site for purposes of monitoring the voluntary program, the formal opening and closing conferences are not required. The DCO must, however, notify the project safety department who will, in turn, notify the Jobsite Voluntary Program Safety Committee.

When the DCO is walking around the site for purposes of monitoring,the DCO should notify management as to the areas of the site he/she wishes to visit. Management may decide whether or not to physically accompany the DCO when the DCO is on the site.

During site monitoring the DCO also has a responsibility to talk to employees and job stewards in the areas visited by the DCO. In these conversations the DCO should make sure that workers and job stewards understand the purpose of the visit.

Employee Protection

It is not the intent of this program to abrogate any of the rights afforded all employees by the California Labor Code.

Exhibit 2
Page 7 of 8

Subcontractors Working at SONGS 2 & 3

Bechtel Power Corporation has responsibility for ensuring that its subcontractors working at SONGS 2 & 3 will participate in the voluntary program and will comply with Cal/OSHA regulations. As with Bechtel supervisors and employees, the DCO has a responsibility to communicate appropriately with subcontractor supervisors and employees about the voluntary program and the DCO's reasons for visiting subcontractor jobs on the site.

Summary of DCO Responsibilities

The following is a summary of the monitoring and enforcement tasks assigned to the DCO:

1. Screen and log all Cal/OSHA complaints originating from the SONGS 2 & 3 site.
2. Investigate all serious complaints by regular Cal/OSHA procedures.
3. Forward complaints of a non-serious nature to the SONGS 2 & 3 Safety Department.
4. Follow up non-serious complaints and document the action taken.
5. Maintain accurate and descriptive field notes of findings at the site.
6. Review the injury and illness logs required by Cal/OSHA.
7. Review the minutes of the meetings of the Jobsite Voluntary Program Safety Committee and evaluate the effectiveness of the program.

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COURT PAPER
STATE OF CALIFORNIA
STD. 113 (REV. 8-72)

Exhibit 7
Page 8 of 8

8. Attend some of the tailgate safety meetings conducted by Bechtel and its subcontractors.

9. Maintain contact with the SONGS 2 & 3 Safety Department as required to maintain effective communication, between the Safety Department and Cal/OSHA.

10. Maintain contact with the representatives of the building trades unions involved as required to maintain effective communications.

11. Prepare a monthly progress report to the Chief of DOSH covering the information relevant to measuring program effectiveness.

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COURT PAPER
STATE OF CALIFORNIA
STD. 113 (REV. 8-72)
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Senator **Riegle**. Let me now ask you, Mr. Babcock, to make your presentation.

Mr. **Babcock**. Thank you, Senator Riegle, I will try to summarize in view of the time.

I do appreciate the opportunity to appear today. One of the major responsibilities of the Michigan Department of Labor is the administration of the safety provisions of the Michigan Occupational Safety and Health Act.

While the objectives of S. 2153, to target enforcement, are commendable, we feel that the bill itself contains serious deficiencies which will serve to undermine the effectiveness of the current state and Federal safety enforcement programs. The goal of OSHA is to provide all employees with a hazard-free workplace. Senate bill 2153, in my judgment, represents a major step away from that goal.

Let me briefly outline some of our concerns.

The first one deals with employer exemptions. Using data reported through the 1978 BLS survey of occupational injuries and illnesses, the number of Michigan employers exempted by one or both of the methods in the bill are estimated to range from 44 percent in manufacturing to 86 percent for financial institutional and real estate firms, an overall exemption of approximately 68 percent of Michigan's work places. The bulk of these employers are in the areas of wholesale trade, retail trade, finance, and service industries. In Michigan, these four major areas represent or employ approximately 50 percent of the employees in the State. During 1978, almost 60,000 recordable injuries occurred in these areas and 15 fatalities, or approximately 13 percent of all program related fatalities in 1978. The seriousness of the safety hazards in these areas includes electrocutions, burns, explosions, and traumatic accidents. Given these statistics, the exemption of such workplaces, in our judgment, is clearly unacceptable. All employees have the right to perform their jobs in a hazard-free work environment, and we feel that the safety program should be prospective in order to avoid problems rather than one that responds after the injury occurs.

While the bill will exempt over two-thirds of all workplaces in the State, the actual impact on MIOSHA is somewhat less. We estimate that about 40 percent of the 5,000 Michigan employers who received annual scheduled inspections last year would be exempt under the law. There are several reasons for that. First, as I indicated, the bulk of the exemptions are in the four classifications that I just noted. Those classifications account for about 9 percent of our normal MIOSHA safety inspections.

Second general scheduled safety inspections are now being assigned from a priority list which provides a "worst first" ranking of employers within the State. Under that system, only the most hazardous workplaces and industries are being inspected.

The impact of the bill on construction worksites is not clear, but the general industry inspection priorities will need to be greatly revised if this bill is passed. Because of the inspection emphasis that MIOSHA places on manufacturing, 86 percent of the affected workplaces are in the manufacturing industries, including such priority areas as lumber and wood products, primary metals, fabricated metal products, and transportation equipment.

Many of the exempted employers now receiving MIOSHA scheduled inspections would be exempted on the basis of how a "high hazard industry" is defined in the bill. That is a major shortcoming in this bill. The only criterion for exemption now included is the number of lost workday injuries. In contrast, Michigan and many other States use a variety of factors, such as the occurrence of permanent impairment injuries, the size of the workplace, the previous inspection history of the employer, the number and type of lost workday injuries. This system has been successful in view of Michigan's declining injury rates. Michigan has had a steady decline in recordable occupational injuries; in the last year we experienced a decline of 20 percent in program-related fatalities, due in large part, in our view, to an effective State safety program.

It's apparent to us that the targeting criteria contained in the bill is simply not adequate to accurately specify which workplaces should or should not be inspected.

We are also very concerned with the provisions of the bill that relate to complaint investigations. We feel that an important employee right under OSHA and MIOSHA is the right to file a complaint. S. 2153 will require that a complaint investigation can only be conducted if either the employer is not exempted from coverage or if the employer has first received notice from the Secretary and has failed to provide the Secretary satisfactory assurances of an appropriate action.

Because of limited inspector resources, it is impossible to regularly inspect all workplaces. In those workplaces that are not regularly inspected, it is often up to the employees to identify and report violations of safety standards. If MIOSHA is not able to fully respond to those complaints, many safety hazards will go unabated. This is underscored by our experience which indicates that nearly 90 percent of all complaints received by us are valid and of these nearly 70 percent result in citations. In fact, we average 4.5 violations per complaint versus 3.5 violations for all inspections.

The situation is further aggravated by language in the bill requiring complaints, and other special investigations in exempt workplaces, to be limited to the "purpose of such inspection or investigation." This language will force an inspector to look the other way if he or she encounters a violation, no matter how serious that violation is, of MIOSHA standards. Not only is this provision illogical, but it poses a question of inspector and agency liability if an injury results from an observed but uncited hazard. Moreover, it will remove the option of conducting a wall-to-wall scheduled inspection at the same time as the complaint investigation. While we do not normally conduct wall-to-wall investigations and complaints, we have done so in the past, to the benefit of both employers and employees and to the benefit of the efficient utilization of our own staff.

The bill seeks to encourage the establishment of safety committees and consultation programs through the limitation or elimination of penalties for cited violations. In Michigan we have been very strongly in support of safety education and prevention programs, as evidenced by a State safety education and training program which is probably the most inclusive of any in the Nation. We provide one consultant for every two inspectors versus the Federal ratio of 1 consultant for every 4 inspectors. We provide grants to labor-management organizations to hire their own safety education staff. And beginning in October we will be providing onsite consultation for small employers.

The development of safety committees is a worthy objective, but we feel that the bill seeks to promote these activities at the expense of safety enforcement activities. In many instances, the existence of certain safety hazards may warrant penalty amounts in excess of the limits proposed in the bill. Rather than limit penalties to fixed amounts, we feel that a more rational approach would be to adjust penalties during the calculation process if the employer has an effective safety committee and has shown a commitment to that committee.

That brings up the second major concern, and that is that in our reading of the bill employers would not be required to act on the recommendations of safety committees and consultants. For safety committees, the employer is required only to "regularly consult with the committee and respond to the recommendations of the committee." Consultants must provide "written reports to the employer of the findings made as a result of consultations," as well as recommendations. In both cases, the employer need not take any corrective action if he or she chooses not to.

Senator Schweiker a few moments ago indicated that his interpretation of the bill was that failure to respond to a recommendation of the safety committee would be considered as evidence of a willful violation. I would disagree in my reading of the bill. Subsection (3) on page 11 of the bill indicates, and I quote:

> No report or recommendation of a consultant or advisory safety committee provided pursuant to this section, or assurance from the employer, pursuant to subsection (a)(1)B, shall be considered as evidence that a violation of this act is willful within the meaning of section 17(a) . . .

If we are misreading the bill, we will stand corrected.

Another problem with the bill deals with the standards for consultants. According to the bill, consultants employed by workers' compensation insurance carriers must be either certified by the Board of Certified Safety Professionals, licensed as professional engineers, or certified by the American Board of Industrial Hygiene. However, consultants employed by other business concerns need only be under contract—meet the competency requirements that are promulgated by the Secretary.

We would submit that this issue is so important that there should be clear standards within the legislation as to what constitutes competent consultation.

Mr. Vial has spoken to the employer-employee sections of the bill, and I would echo his concerns. In fact, targeting inspections on the basis of workers' compensation reports simply does not recognize the complexity of those reports or the intent of those reports.

The fact is that in Michigan, as in many other States, the reports are not submitted until an injury has resulted in 7 days of lost time. The fact is many times those reports deal with contested or alleged injuries or illnesses which may or may not be compensable under workers' compensation.

A major flaw in the bill is that it does not adequately deal with the question of construction and other types of mobile worksites. For example, it is unclear as to whether the term "workplace" includes one or all of the worksites at which a construction contractor may be operating. Traditionally, construction worksites have been high-hazard operations that have received considerable attention from MIOSHA. Because of the importance of these safety efforts, the definition of "workplace" should be expanded and clarified, how they will be treated under S. 2153.

We feel the most practical solution would be to define "workplace" as including all operations of a given contractor. Not only would this simplify contractor recordkeeping, but it would also develop an overall safety rating for the contractor which could transcend and adequately indicate the injury experience of all the operations.

Let me speak for a moment about funding, because, again, S. 2153 would appropriate $5 million for the administrative costs associated with the implementation of the act and presumably will assist States in adapting their workers' compensation systems.

The $5 million is not a sufficient amount. Further, I would respectfully recommend that any additional cost to State government because of this or other legislation be fully funded by the Federal Government. As you are aware, Senator Riegle, in Michigan we are going through severe economic problems. And I do not think frankly the State legislature will be supportive of a tremendous increase in administrative responsibilities and costs envisioned in S. 2153.

While the intent of S. 2153 is laudable, the bill contains many serious deficiencies. Perhaps the most important deficiency is that the bill is simply not necessary. This is reflected in the issues that S. 2153 seeks to address.

One objective of S. 2153 is to limit inspections to high-hazard workplaces. This is currently being accomplished in all States through the use of inspection targeting systems which establish inspection priorities. These systems have effectively limited inspections to those worksites where they are truly needed. The bill also seeks to provide economic incentives for the creation of safety committees and consultation programs. These incentives already exist in the form of lower workers' compensation costs and other accident-related costs that naturally result from a reduction in the number of occupational injuries.

In view of these considerations, the Michigan Department of Labor strongly urges the defeat of this bill. Our Department remains committed to the goal of providing a fully effective safety program for the workers of Michigan. MIOSHA has been and continues to be a positive and progressive State policy, one that has received support from both organized labor and management. One that has received support from both Republicans and Democrats in both the legislative and executive branches.

We feel that our program has good safety programs and has made a difference in occupational injuries. We feel that the passage of S. 2153 would be a major step backwards in our progress toward reaching hazard-free worksites.

Thank you, Mr. Chairman. I would be more than happy to respond to any questions you may have.

[The prepared statement of Mr. Babcock follows:]

Testimony On
The Schweiker-Williams Occupational
Safety and Health Improvements Act
(S. 2153)

Before the U.S. Senate Committee On
Labor and Human Resources

By

C. Patrick Babcock
Michigan Department of Labor

April 17, 1980

The Schweiker-Williams "Occupational Safety and Health Improvements Act" proposes many new limitations on the scope of state and federal OSHA enforcement activities. The stated purpose of the bill (S.2153) is to "concentrate enforcement activities on hazardous workplaces and encourage self-initiative in improving occupational safety and health". This will be accomplished by limiting occupational safety inspections to certain "high hazard" workplaces and by the creation of incentives for the establishment of employer-sponsored safety advisory committees and consultation programs. Implementation of S.2153 is scheduled for January 1, 1981.

While the overall objectives of focusing enforcement activities and encouraging employer self-initiative are commendable, the bill contains many serious deficiencies which can only serve to undermine the effectiveness of the current state and federal safety enforcement programs. The goal of these programs is to provide all employees with hazard-free workplaces. The Schweiker-Williams bill represents a major step away from meeting this objective. Because of the many objectionable provisions contained in S.2153, the Michigan Department of Labor opposes the passage of this legislation in its present form.

Detailed below is a description of the major provisions of the bill and an analysis of the projected impacts.

Employer Exemptions

The bill will exempt employers from general scheduled occupational safety inspections by one of two methods. The first method will exclude those employers that, during the preceding calendar year, report no occupational injuries to the state Workers' Compensation agency. An occupational injury is defined as an injury which has resulted in two or more lost workdays.

A second exemption would eliminate those workplaces where no fatalities have occurred and where the number of lost workday injuries is less than, or equal to, an amount specified in the bill. The maximum number of lost workday injuries allowable in order to qualify for this exemption varies with the size of the employer. For the purpose of this exemption, a lost workday injury is an injury which results in the loss of one or more workdays.

By using data reported through the 1978 BLS Survey of Occupational Injuries and Illnesses, the number of Michigan employers exempted by one or both of these methods can be estimated. These figures are presented in Table 1.

TABLE 1.

EXEMPTED EMPLOYERS BY INDUSTRY - MICHIGAN

	Exempted Employers	Total Employers	Percentage Exempted
Agriculture	1072	-	-
Manufacturing	5662	12947	43.7
Transportation	2097	4044	51.9
Wholesale Trade	6522	11757	55.5
Retail Trade	26479	36933	71.7
Finance, Insurance and Real Estate	8212	9554	86.0
Services	28373	40785	69.6
Total	78417	116020	67.6*

* Does not include Agriculture

Of all fixed-site employers in Michigan, over two-thirds could potentially be exempted by the Schweiker-Williams bill. The bulk of these employers are concentrated in the Wholesale Trade; Retail Trade; Finance, Insurance and Real Estate; and Services industries. In Michigan, these four major industry categories account for nearly 89% of all exempted workplaces and include approximately 50% of the employees within the state. Moreover, almost 60,000 occupational injuries (recordable) and 15 fatalities occurred in these industries in 1978. The seriousness of the safety hazards that can exist in these industries is reflected by the occurrence of fatalities resulting from electrocutions, burns, explosions, and other traumatic accidents. Given these statistics, the exemption of such workplaces is clearly unacceptable. All employees deserve the right to perform their jobs in a hazard-free work environment.

Inspection Program Impact

While the bill will exempt over two-thirds of the workplaces in Michigan, the actual impact on MIOSHA safety enforcement operations will be somewhat less. If S.2153 is enacted, it is estimated that approximately 40% of the 5,000 Michigan employers now receiving annual scheduled inspections (general industry only) would be exempt. There are several reasons why the impact of the bill on the inspection program worksites is less than the total impact on all workplaces. Of primary importance is the fact that most (90%) of the exempted employers are in the Wholesale Trade; Retail Trade; Finance, Insurance and Real Estate; Services; and Agriculture industries. These industries currently account for approximately 8.9% of all MIOSHA safety inspections.

Secondly, general scheduled safety inspections are now being assigned from a "priority list" which provides a "worst first" ranking of employers within the state. Under this system, only the most hazardous workplaces and industries are being inspected.

Despite these considerations, the bill will have some serious implications for MIOSHA. While the impact of the bill on construction worksites is unclear (see section on "Mobile Worksites"), general industry inspection priorities will need to be greatly revised if S.2153 is passed. Because of the inspection emphasis that MIOSHA places on manufacturing, the bulk of the affected workplaces (those that are now being inspected, but exempt under S.2153) are in the manufacturing industries (86%). Of these exempted manufacturing employers, 75% are included in the MIOSHA priority industries of Lumber and Wood Products; Primary Metals; Fabricated Metal Products; Machinery; and Transportation Equipment.

Many of the exempted employers now receiving MIOSHA scheduled inspections would be exempted simply on the basis of how a "high hazard" industry is defined by the bill. The only criteria for exemption now included in S.2153 is the number of lost workday injuries. In contrast, Michigan uses a variety of factors, such as the occurrence of permanent impairment injuries, the size of the workplace, the previous inspection history of the employer, the number and type of lost workday injuries, and other criteria for the establishment of inspection priorities. This system has been highly successful in view of Michigan's declining injury rates in recent years.

It is readily apparent that the exemption criteria contained in the bill is not adequate to accurately specify which workplaces should or should not be inspected. The development of such criteria is an administrative responsibility that should not be dictated by legislation. By writing inspection priorities into law, the bill will greatly reduce both the flexibility and effectiveness of MIOSHA and OSHA enforcement programs.

Complaint Investigations

An important employee right under the OSHA and MIOSHA legislation is the right to file a complaint. However, S.2153 will require that a complaint investigation can only be conducted if either the employer is not exempted from coverage, or if "the employer has first received notice from the Secretary of (the complaint) and has failed to provide the Secretary with satisfactory assurances that appropriate action, if any, has been taken to correct the violation". This provision raises a number of important issues.

Because of limited inspector resources, it is impossible to regularly inspect all workplaces. In those workplaces that are not regularly inspected, it is often up to the employees to identify and report violations of safety standards. If OSHA or MIOSHA is unable to respond to these complaints, many safety hazards may go unabated. This is underscored by statistics which indicate that 87% of all complaints received by MIOSHA are valid complaints and of these valid complaints, citations are written during 70% of the investigations. An average of 4.5 violations are found during each complaint investigation compared to 3.5 violations for all inspections.

The situation is further aggravated by language in the bill requiring complaint, and other special investigations in exempt workplaces, to be limited to the "purpose of such inspection or investigation". This language will force an inspector to "look the other way" if he or she encounters a violation during an investigation and the violation is outside the "scope" of the inspection. Not only is this provision illegical, but it poses a question of inspector' and agency liability if an injury results from an uncited hazard. Moreover, it will remove the option of conducting a "wall-to-wall" scheduled inspection at the same time as the investigation. While MIOSHA conducts relatively few inspections of this type, it does provide a means for administrative efficiency in that the inspector need not make a return visit for a scheduled inspection at a latter date.

Safety Committees and Consultation

The bill seeks to encourage the establishment of safety committees and consultation programs through the limitation or elimination of penalties for cited violations. In workplaces exempt from scheduled inspections, no penalty can be assessed if the employer has an advisory safety committee and consultation program or ten or fewer employees. In non-exempt workplaces, the existence of a safety committee and consultation program will limit the penalty amount to $700 for serious violations and $300 for non-serious violations.

Obviously, the development of safety committees and consultation programs is a worthy objective. Unfortunately, the bill seeks to promote these activities at the expense of safety enforcement activities. In many instances, the existence of certain safety hazards may warrant penalty amounts in excess of the limits proposed by the bill. Rather than limit penalties to fixed amounts, a more rational approach would be to adjust penalties during the penalty calculation process if the employer has a safety committee and consultation program. Lower penalties would result for those employers who have shown "good faith" by establishing committees and consultation efforts. Such a penalty reduction could be built into the standard penalty assessment calculations now used by MIOSHA and OSHA.

A second major concern is that employers will not be required to act on the recommendations of safety committees or consultants. For safety committees, the employer is required only to "regularly consult with the committee and respond to the recommendations of the committee". Consultants must only provide "written reports to the employer of the findings made as a result of consultations, together with such recommendations as may be appropriate". In both cases, the employer need not take any corrective action if he or she so chooses.

Another problem concerns the standards for consultants set by the bill. In several instances these standards are inconsistent. For example, consultants employed by a Workers' Compensation insurance carrier must be either certified by the Board of Certified Safety Professionals, licensed as professional engineers, or certified by the American Board of Industrial Hygiene. However, consultants employed by other "private business concerns" need only be "under contract with the Secretary". The consulting standards contained in the bill should be revised to apply equally to all consultants in order to assure that high professional standardc are maintained.

A final concern relating to these sections is the procedure for determining whether the employer's safety committee or consultation program qualifies for the penalty limitations provided by the bill. In order to approve these limitations, OSHA or MIOSHA must determine if employer safety committee and consultation programs meet the criteria specified in the bill. Because employer records of these activities will most likely be very limited, this will be a difficult and costly task. Considerable litigation,and concomitant administrative costs,may result from such determinations.

Employer Reporting

The bill will require employers to report all injuries that result in two or more lost workdays to the state Workers' Compensation agency. This will present a number of reporting and coverage problems. Because Workers' Compensation laws are unique to each state, the number of reported cases in each state is greatly influenced by the scope and coverage provided by each law.

Using these laws as the basis for excluding employers from inspection will provide little uniformity from state-to-state.

In addition, most states require a three or seven day "waiting period" for reporting compensable injuries. The provision for reporting of injuries with two or most lost workdays will force the creation of new data systems in many states. For example, Michigan employers report only those compensable cases with seven or more lost workdays. The reporting of cases with two or more lost workdays would result in a three to four-fold increase in the number of cases now being submitted. This will place a large recordkeeping burden both on the employers who must prepare the report and tho state agency that must process them.

Furthermore, employers seeking to take advantage of the lost workday case exemption will be required to submit an affidavit stating that the firm is eligible for such an exemption. Again, the processing of these affidavits will present a considerable administrative burden for the agency responsible for this task.

Finally, many of the provisions of this bill rely on the voluntary reporting of information by the employer. Unfortunately, in most cases, it will be impossible to verify the accuracy of this information. Given the great incentive presented by the possibility of avoiding inspection, the potential for abuse of these provisions by some employers is quite real. This potential is increased by the lack of any explicit sanctions for the false reporting of information within the bill. The bill mandates only that "if the Secretary finds a workplace for which the provisions of subsection (a) or (d) are claimed does not qualify, the Secretary shall rule the workplace not qualified and shall notify the employer of such ruling". While the sanctions contained in sections 17(g) and 35(7) of the OSHA and MIOSHA legislation may be applicable to the false reporting of information under the bill, such penalties should be clearly specified in the text of S.2153.

An alternative to the reporting systems required by the bill would be to make use of the occupational injury and illness recordkeeping program presently operated by the Bureau of Labor Statistics. This system, which is uniform from state-to-state, would provide a usuable measure of lost workday injuries in each workplace. Since the system is already in existence, there would be no additional recordkeeping requirements for employers. If an employer claims an exemption under S.2153, then he or she could forward a copy of the last page of the Log and Summary of Occupational Injuries and Illnesses (Form 200), and a statement indicating the average number of full-time employees, to the appropriate state or federal agency. These documents would then be evaluated by the agency to determine whether the exemption requirements have been met.

Mobile Worksites

A major flaw in the bill is that it does not adequately deal with the question of construction and other types of mobile worksites. For example, it is unclear as to whether the term "workplace" includes one or all of the work-sites at which a construction contractor may be operating. Section 4A(a)(4) defines "workplace" to include "all locations at which services are performed by employees of the employer". This would seem to define all contractor worksites as a single "workplace". However, the last sentence of this section provides that "where distinctly separate activities are performed at a single physical location, each activity shall be treated as a separate workplace". This would indicate that each contractor at a worksite would be treated as a separate "workplace".

Traditionally, construction worksites have been high hazard operations that have received considerable attention from both MIOSHA and OSHA. Because of the importance of these safety efforts, the definition of "workplace" should be expanded to clarify how such worksites will be covered by S.2153. The most practical solution would be to define "workplace" as including all operations of a given contractor. Not only would this simplify contractor recordkeeping, but it would also develop an overall safety rating for the contractor which could transcend the injury experience at any specific worksite.

Funding

The bill will provide the sum of $5 million for the administrative costs associated with the implementation of S.2153. What is not indicated is whether this funding will be 100% federal monies or a state/federal match. If funding is to be on a match basis, the bill may have serious budgetary implications for those states with 18(b) plans. Use of a 50/50 or 90/10 match will require that large amounts of funds be transferred from enforcement operations (field staff, supervisors, etc.) into data processing and statistical support services. Because of this, all costs associated with this bill should be 100% federally funded.

Summary

While the intent of S.2153 is laudable, the bill contains many serious deficiences. Perhaps the most important deficiency is that the bill is simply not necessary. This is reflected in the issues that S.2153 seeks to address.

One objective of S.2153 is to limit inspections to high hazard workplaces. This is currently being accomplished in all states through the use of inspection targeting systems which establish inspection priorities.

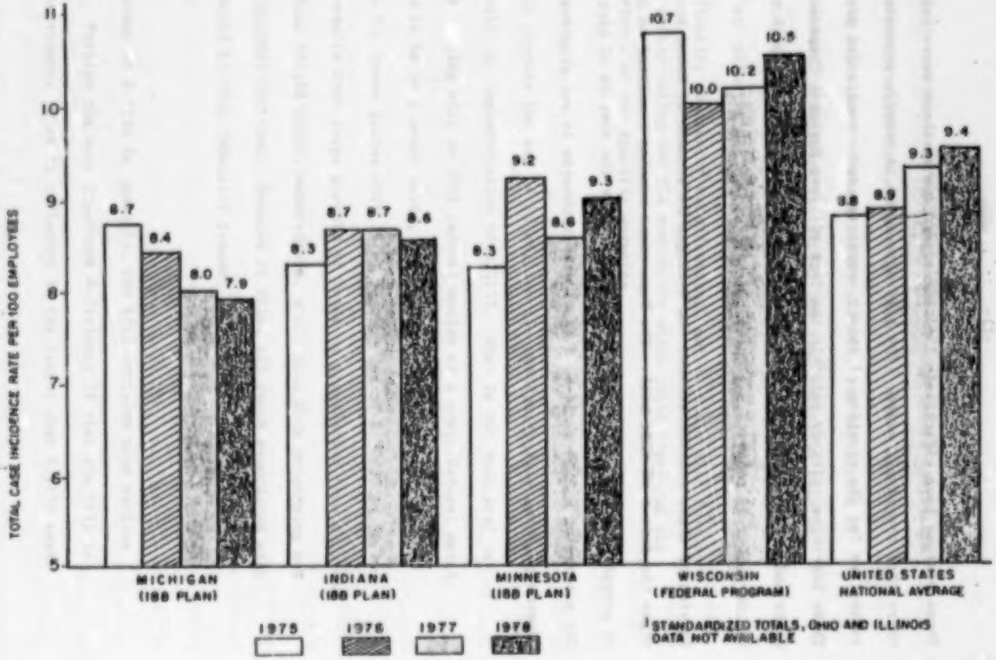
These systems have effectively limited inspections to those worksites where they are truly needed. The bill also seeks to provide economic incentives for the creation of safety committees and consultation programs. These incentives already exist in the form of lower Workers' Compensation costs and other accident-related costs that naturally result from a reduction in the number of occupational injuries.

In view of these considerations, the Michigan Department of Labor strongly urges the defeat of this bill. The Department remains committed to the goal of providing a fully effective safety program for the workers of Michigan. The passage of S.2153 would be a major step backwards in our progress towards reaching that objective.

CHART I

COMPARISON OF REGION V OCCUPATIONAL INJURY AND ILLNESS INCIDENCE RATES

1975-1978 PRIVATE SECTOR ONLY[1]



[1] STANDARDIZED TOTALS, OHIO AND ILLINOIS DATA NOT AVAILABLE

Senator **Riegle**. First of all, Mr. Babcock, let me say to you what I said to our witness from California, and that is that this committee greatly admires the performance that has been done in Michigan. And I want to compliment you and your staff for your leadership both in terms of conceptualizing how this might be done, and then following through and seeing that it is done.

I think the fact that in Michigan we have a sound program that is working, that it is one, as you point out, that has won and kept bipartisan support, that we have statistics that show that we are reducing injuries and fatalities in the workplace, is a tremendous I think recognition of the fact that we are on the right track, that the steps that we have taken in this regard both at the Federal level and at the State level—that this partnership is working, that it is paying dividends, saving lives, saving injuries, saving lost hours, saving cost—and, after all, that is what we want to try to accomplish here.

So I give great weight to your testimony today in terms of the reservations you express about—in fact, tipping the system upside down. It seems to me that we have made good progress, we have got a kind of adaptation that is working, where a serious effort has been made to make it work. And I think that is a very strong case that you have given us.

We do have a series of questions on behalf of the committee that we would like to pose to both of you.

In the interests of time I am going to ask you to respond to those for the record. The staff will make those available to you.

[The questions referred to follow:]

WILLIAMS. N.J.
1980 MAY 27 AM 9 30

STATE OF MICHIGAN

WILLIAM G. MILLIKEN, Governor

DEPARTMENT OF LABOR
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C. PATRICK BABCOCK, Director

May 19, 1980

The Honorable Harrison A. Williams, Jr.
Chairman, Committee on Labor and Human Resources
United States Senate
Washington, DC 20510

Dear Senator Williams:

Thank you for your kind letter of May 2, 1980 concerning my testimony at the recent OSHA Legislative Hearing conducted by the Committee on Labor and Human Resources. I also wish to express my appreciation for the opportunity to address the committee on this important issue.

Before responding to your specific questions, a restatement of my position regarding the "Occupational Safety and Health Improvements Act of 1980" (S.2153) is in order. While we believe that the basic objectives of S.2153 are commendable, the bill contains many provisions that will serve to seriously impair the effectiveness of occupational safety and health programs in this country. Because these provisions will undermine our progress toward providing a "fully effective" safety and health program for all Michigan workers, we cannot support this legislation in its present form. We strongly urge you to reconsider your support of this bill.

Contained within your May 2nd letter are two questions relating to the operation of the occupational safety and health program in Michigan (MIOSHA). The first question concerns our procedures for targeting workplaces for general scheduled inspections.

For non-construction workplaces, inspection targeting has focused on those industries with either a very high injury incidence rate or a very large number of occupational injuries. These industries are identified via data obtained through the BLS Annual Survey of Occupational Injuries and Illnesses. In the past, target industries have included firms in Standard Industrial Classifications (SIC) 24 (Lumber and Wood Products), 33 (Primary Metal Industries), 34 (Fabricated Metal Products), 35 (Machinery), and 37 (Transportation Equipment). During 1978, SIC's 24, 33, 34, and 35 reported injury incidence rates in excess of 11.9 cases per 100 employees, while over 28,000 injuries occurred in SIC 37.

Within each of these target industries, workplaces are selected for inspection if the worksite meets one of a number of criteria. The use of such criteria helps assure that only those individual workplaces with poor safety records are subject to inspection. In general, a MIOSHA general scheduled safety inspection will be conducted if the workplace had:

- A high incidence of compensable injuries (as reported through the state Workers' Compensation system)
- A large number of violations during the last inspection
- A power press injury or violation reported during the previous calendar year
- A permanent impairment injury (such as an amputation) reported during the previous calendar year
- A large number of employees
- A history under MIOSHA, or previous programs, which indicates the need for inspection

While the emphasis of the MIOSHA inspection program is on these "priority" industries and workplaces, non-priority employers are also subject to inspection if certain conditions are present. These conditions include a high rate of compensable injuries, the occurrence of a power press injury or violation, or the report of a permanent impairment injury. In this way, non-priority workplaces with below average safety records are provided with inspection coverage.

The targeting of inspections in the construction industry is performed in a somewhat different manner. Because of the transient nature of construction worksites, it is virtually impossible to generate an accurate injury history for individual workplaces. Given this constraint, BLS survey and Workers' Compensation data have been used to identify those "work operations" that are most hazardous. Currently, target work operations include:

- Tunneling and open cut work
- Water treatment and waste water treatment plant construction
- Power generation plant construction
- Apartment and high-rise building construction

Construction projects involving these operations are given priority over other construction activities. The nature of construction worksites is determined through the use of "Dodge" reports which indicate the extent of each project.

A second question raised in your May 2nd letter pertains to complaint investigations. Specifically, you ask as to when such investigations are expanded to a wall-to-wall inspection of the workplace. In general, such wall-to-wall inspections are conducted under the following circumstances:

- When a compliance officer notes obvious violations during the course of the investigation that are not covered by the complaint
- When the workplace is covered by the priority program and would receive a scheduled inspection at a later date. Under this procedure, both the complaint investigation and the scheduled inspection can be performed during a single visit to the worksite.
- When a review of injury and illness records during the course of a complaint investigation indicates hazardous conditions outside the scope of the complaint
- When a safety officer receives additional complaints from workers involving alleged hazards not covered in the original complaint.

In all of these instances, procedures require the inspector, in the absence of an imminent danger situation, to obtain the approval of his or her supervisor before expanding the scope of the inspection. This is usually done by telephone. The employer and any employee representatives are advised of the expansion in the scope of the inspection and of the reason for doing so.

Given the fact that nearly one-half of all jurisdictions in the United States have state-run OSHA programs, I believe it to be of the utmost importance for Congress to obtain the views of the representatives of the states concerning legislation, including appropriations, which may impact OSHA. You have been most kind in extending this opportunity and I wish to again thank you for allowing us to provide you with our testimony and insights regarding this important issue.

Moreover, as you may know, the State Designee's Organization at a recent meeting in San Francisco unanimously voted to oppose S.2153. This opposition, I understand, was based on many of the same reasons and concerns that were expressed by Don Vial of California and myself before your committee.

The Honorable Harrison A. Williams, Jr.
Page 4
May 19, 1980

If I may be of further assistance, please do not hesitate to contact my office or any of the MIOSHA staff.

Sincerely,

C. Patrick Babcock
Director

CC: Dr. Eula Bingham
Don Vial
K. Stariha

DOL #2760

Senator **Riegle**. We have another witness that will be testifying today.

I want to thank both of you and your staffs who accompany you for being here today and for your testimony. And I am going to say to the next witness, which is the law firm of Seyfarth, Shaw, Fairweather & Geraldson, that Senator Schweiker will be returning here momentarily, and I am going to put the committee in recess until such time as he returns to the room. And he will act as chairman during the testimony of our last witnesses today.

So I assume they are in the room, and I would ask them to remain during the recess until Senator Schweiker returns.

But, again, I want to thank the witnesses at the table. And you have been very helpful to us.

[A brief recess]

Senator **Schweiker**. We will reconvene the meeting of the Senate Labor and Human Resources Committee. We appreciate your kind indulgence. We know it has been a very long day for the presiding Senator, but also for the witnesses as well. And we are sorry about the interruption and the scheduling situation.

So we are very pleased to have as our last panel for the day representing the law firm of Seyfarth, Shaw, Fairweather & Geraldson, Mr. Robert E. Mann and Mr. Mark A. Lies.

Would you gentlemen introduce your other colleague and proceed.

STATEMENT OF ROBERT E. MANN, ESQ., OF SEYFARTH, SHAW, FAIRWEATHER & GERALDSON, ACCOMPANIED BY MARK A. LIES, ESQ., AND F. KEITH ADKINSON, ESQ.

Mr. **Mann**. Thank you, Senator. With me is Mr. Keith Atkinson, also of our firm.

We do appreciate and welcome this opportunity to express our views concerning the proposed Occupational Safety and Health Improvements Act, Senate bill 2153.

We have a prepared statement which we would like to have included in the record in its entirety. In the interest of time, however, we would like to briefly summarize our statement.

Senator **Schweiker**. We will put your whole statement in the record, and we appreciate your understanding.

Mr. **Mann**. Since 1970, when the Occupational Safety and Health Act was passed, our firm has represented a large number of American business entities in their relationship with the Occupational Safety and Health Administration, and have counseled many such firms with respect to the legal requirements under the act. We have followed many, many cases from beginning to end, commencing with inspections and ending with litigation or settlement or decisions not to contest.

I would like to say, Senator, at the outset, that we are here representing our firm and also here on behalf of our clients, and would like to state that our clients without exception, to our knowledge, fully support the purposes and goals of the Occupational Safety and Health Act.

However, based on our experience in seeing firsthand the difficulties and frustrations experienced by many responsible employers in their attempts to understand and comply with the act, we would urge the committee to give favorable consideration to the legislation that you are sponsoring.

We have been here today listening to a number of comments about your legislation, and——

Senator **Schweiker**. You got a lot of education, then, I am sure.

Mr. **Mann**. We were quite surprised at the wide variety of comments, and a number of misrepresentations, both in terms of what your legislation would do, and in terms of the benefits that it would achieve.

We believe that your legislation correctly recognizes that the resources of the Occupational Safety and Health Administration are being misused, to some degree at least, and that the purposes of the act are being frustrated thereby.

As you know, Senator, the role of the Government under the act was, as it should be, to assist employers affected through research and education and by providing uniform and evenhanded enforcement of accepted standards to eliminate competitive disadvantages for those who undertake to comply with the act.

The purpose of the legislation, as stated in section 2 of the act, was to encourage employers in developing new standards and new techniques for complying with safety and health legislation. Unfortunately, and our review of the testimony presented in the oversight hearings tends to confirm this, OSHA has instead adopted a very heavy-handed enforcement approach based upon penalty collection and attempted coerced compliance with a wide variety of standards which have not been shown necessarily to be principal contributors toward the accident rates in this country. No one has convincingly demonstrated that the present penalty inspection scheme, as it is now being followed, has had any measurable effect permanently to reduce the incidence of occupational workplace injuries. And no one has coupled the citation of any reduction in occupational injury statistics with any particular enforcement plan that is now being implemented.

It is our view that if any permanent reduction in the number of workplace injuries has occurred, it has occurred because of aspects of OSHA other than the present enforcement scheme and as a result of employer, labor union, and individual employee initiatives.

We believe that Congress must take some action to make the act effective and to achieve its purpose and promise for the American workers.

A number of the problems, Senator, with the present enforcement scheme, and which we believe your legislation would help address, we have listed in our report, and I would like to briefly summarize them. They all relate to the inspection process.

Currently, OSHA has a stated policy to conduct a wall-to-wall inspection with respect to each workplace it inspects as a result of an employee-generated complaint, irrespective of the nature of the industry, the number of lost-time statistics there are at the workplace, or any other factor other than the fact that an employee complaint has been generated.

We believe that this effort, which is extremely time consuming, tends to take the resources of OSHA, and particularly their key personnel, away from investigations, research, and other programs designed to eliminate some of the kinds of hazard that we heard witnesses discussing today which normally would not be disclosed during the course of an ordinary inspection.

We believe that your legislation, Senator, would be a very important step toward requiring OSHA to conduct its inspections on the basis of actual hazard and instances of injury rather than simply to conduct an inspection simply because they happen to be in a particular plant at a particular time.

Some of the other problems that we encounter with inspections under the present scheme are the unbridled use by OSHA of the so-called general duty clause in the issuance of citations, thereby attempting to set standards de facto without regard to the Administrative Procedure Act. And in particular we find OSHA attempting to utilize the general duty clause from time to time to impose a penalty on an employer for the employer's own initiative in seeking to correct occupational safety and health problems that are not necessarily covered by standards or in cases where the employer's own procedures are more comprehensive and beneficial than the Occupational Safety and Health procedures.

We see OSHA continually attempting to enforce, through citation and penalty, standards and regulations which repeatedly have been held invalid, unenforceable, nonmandatory, or otherwise inapplicable by the Occupational Safety and Health Review Commission and by the courts rather than to do the necessary research to bring those standards up to date and to make them uniformly applicable and enforceable.

We have seen OSHA in the course of these unbridled inspections failing to utilize its own internal procedures for assessing penalties and characterizing violations. We have seen an unfortunate history of local area directors being constrained in their abilities effectively to deal with employers in their area on a joint cooperative basis to deal with accident prevention and resolution of issues that have been raised in the citation and penalty collection schemes.

One of the key problems that we would like to stress again with the inspection techniques now utilized by OSHA and which relates to one of the purposes of the original legislation is the use by OSHA of essentially untrained inspectors to conduct inspections in workplaces where the inspectors have no familiarity, no understanding of the types of hazards that are present there. Oftentimes we find fairly young, inexperienced OSHA inspectors entering a plant and actually having to consult with the employer's own safety people as to how to conduct an appropriate inspection.

We have seen instances where OSHA has refused or declined to enter into meaningful consultation with employers without coupling that consultation with the issuance of citations and penalties. During the course of this proceeding, for example, the name of the company Newport News Shipbuilding & Drydock has come up. That company is a good example of one which has attempted to cooperate with OSHA in development of standards particularly applicable to the shipbuilding industry, and in particular certain scaffolding standards that the company commissioned an engineering study to review in order to point out to OSHA that their own standards were inconsistent, contradictory, and would actually create hazards. Notwithstanding the efforts by that employer, OSHA turned a completely deaf ear on that effort to attempt to rectify those standards.

Now, as a result of these and other abuses of the enforcement procedures, it is clear that the number of citations has risen dramatically in recent years; the number of employer contests has risen dramatically; and the number of final mutually agreeable resolutions through settlement procedures has also declined dramatically without producing any significant or permanent reduction in the number of lost-time injuries.

In short, we believe, Senator, that the present enforcement scheme is costly, inefficient, nonproductive and, in all probability, counterproductive.

We believe that the amendment to the act that you propose would take the act and move it in the direction of achieving the promise that it originally made to the employees of this country.

First, we applaud the approach of encouraging employers to resort to self-initiative in attempting to reduce their lost-time frequencies. We note, for example, in the course of representing a number of employers that those employers who internally set goals for achieving lost-time frequency rates generally have the better safety records in their plants. Yet one such employer, a steel company in Chicago, had a lost-time frequency rate of 0.49 for the year 1978 was subjected to a 19-day wall-to-wall inspection by an OSHA inspector.

We wonder, Senator, with that type of record, what that inspector was doing in that plant while presumably there are other employers with a much higher lost-time frequency rate that needed inspection—why that inspector was in that particular plant.

At the conclusion of that inspection, Senator, the only citations that could be issued by that inspector were citations for violations of crane standards which have been repeatedly declared invalid, unenforceable, as to the type of crane that this particular employer utilized.

Senator **Schweiker**. And that was after 19 days of inspecting?

Mr. **Mann**. Nineteen days of inspecting, yes, Senator.

Senator **Schweiker**. And what was this company's accident rate, again?

Mr. **Mann**. About 0.49. We believe that the approach that you are proposing in your amendment is necessary; it is the kind of approach that is going to at least take a step in the right direction to encourage employers to achieve lower accident rates with the promise that, to some degree at least, they will not be subjected to the kind of costly and inefficient inspection procedures that have been experienced.

We also believe that your amendment would have a salutary effect of freeing up OSHA resources to concentrate in those areas where there is the greatest need for inspection and the greatest need for investigation of the causes and cures of occupational injuries.

The amendment would also offer employers a limited opportunity to attack those matters cited by the interagency task force as the cause of 75 percent of injuries without fear of subsequent citation for general duty clause or specific standard violations for attempting innovation. We believe it would encourage employers to give appropriate priority to the high-hazard conditions in their own plants in lieu of attempting strict literal compliance with the many thousands of individual standards, most of which have not been shown to be principal causes of industrial injuries.

We do wish to point out to the committee that we have one reservation about the proposed amendment, and would like to take a brief opportunity to discuss that.

In the *Barlow* decision which has been referred to in these hearings, the Supreme Court noted that it would be appropriate for OSHA to obtain a warrant to conduct a workplace search based upon neutral criteria, uniformly applied throughout industry.

We do not understand, Senator, that it is your purpose to set the exemption levels as some type of norm for obtaining search warrants under the Barlow's approach. We feel that the present exemption standards, as you have set forth in the amendment, would put too broad an exception on the Barlow's approach and could possibly be detrimental to the overall purposes of the amendment, which is to secure and encourage OSHA in conducting inspections on a priority basis, based on the existence of actual hazards.

Although we and many of our clients sincerely believe that the existing situation with respect to the wall-to-wall unrestrained OSHA inspections is so deplorable that major corrective surgery would be required to redirect OSHA's efforts to be consistent with its original mandate, let us assure you that if the end result of your endeavors is nothing more than congressional direction to OSHA mandating the development of meaningful criteria for conducting inspections, then you will have taken a giant step forward in restoring the faith of the business community in the integrity of the system.

We do thank you, Senator and committee, for scheduling these hearings and for affording us an opportunity to testify.

I would also note, before concluding my preliminary statement, Senator, that we have prepared and wish to enter into the record a statement on behalf of Newport News Shipbuilding Co. in response to comments made about that employer during the course of the oversight hearing and earlier in the course of these hearings.

We do appreciate the cooperation of the staff in making that statement available.

In addition, a number of our clients are interested in preparing a written statement for submission into the record of these proceedings, and we respectfully request that the record be kept open for that purpose.

Senator **Schweiker**. Thank you very much. I would just like to pursue your point on the *Barlow* case a little bit, because I think it is very interesting. We have had some of the witnesses that were antagonistic to my bill throw this up as a red herring.

The other day Dr. Bingham suggested the bill would increase litigation over who OSHA can inspect under Barlow. You seem to suggest that we might actually reduce Barlow litigation by establishing a clear congressional mandate on targeting inspections.

Is that accurate? And I wonder if you would expand on this point.

Mr. **Mann**. I believe that observation is essentially accurate, Senator. It's our experience—and we have represented quite a large number of employers—it is our experience that an employer rarely, if ever, seeks or demands evidence of a search warrant in cases where an inspection is tailored to some obvious legitimate scheme, be it an employee complaint, a representation that the inspector wishes to inspect particular portions of the plant for particular kinds of hazards—those kinds of inspections are rarely resisted, if ever. Our standard advice to clients is not to resist those types of inspections on the basis of demanding a warrant.

Our concern is that if the exemption levels are stated in terms that are so broad that any employer might be affected or not affected on a total categoric basis without regard to the existence of particular hazards and conditions in their plant, that this legislation would then be used as a means for simply continuing the general kind of wall-to-wall inspection that we have seen in the past and that seem to be so much detested by employers.

For that reason, we would urge you and the committee to give some additional consideration to the method for establishing the exemptions, perhaps by tailoring it to industry-by-industry, hazard-by-hazard—I am sure the staff, on consultation with the administrative agencies, could be helpful in that.

But we do think that the present broad—this general level of lost-time injuries—may be just too broad and may simply encourage OSHA to go on the way they have done.

Senator **Schweiker**. On page 6 of your statement you say a problem with OSHA has been the use of untrained compliance officers.

I wonder if you would elaborate a little bit on that?

Mr. **Mann**. Yes. At another steel company recently an inspector came in and exhibited to the employer total lack of familiarity with the steel industry, indicated he had never been in a steel plant before, and asked the employer's hygienist how to operate certain equipment that he was going to use to conduct a hygiene inspection, and in other ways demonstrated that he simply really did not know what he was doing.

We believe, Senator, that if OSHA was going to properly use its resources to achieve a significant reduction in lost time injuries, it must first undertake to train its own inspectors in the appropriate methods of identifying hazards within the industries they intend to inspect.

Now, it is true that over a period of time compliance officers tend to gain some familiarity, and as they grow in their professions, obviously they become more helpful. But the typical experience of the people that we deal with is that the compliance officers do not appear to understand how the industry works, or particularly where to look for real hazards.

The typical compliance officer will come into a plant with measuring tape, and measure all rungs of the ladder, measure degree of stairs, take a look at the washroom to see if it is clean, and does these kinds of things that do not require a lot of sophistication in terms of accident prevention and professional safety expertise.

We think that your bill would encourage OSHA, in the course of redirecting its resources, also encourage OSHA to take greater care to train their employees to look for actual hazards in the workplace, rather than simply go around and measure all of the existing facilities.

Senator SCHWEIKER. Dr. Bingham said she has eliminated all these Mickey Mouse things. I gather from that that you feel there is still some problem?

Mr. MANN. No one knows for sure, Senator, but I guess some of the best estimates are there are 23,000 or so safety regulations. Our analysis of the regulations that were eliminated, which Dr. Bingham and her staff indicate that she eliminated those regulations which were generally not enforceable any way, and which oftentimes related only to property, rather than to safety and health, but did leave intact the vast bulk of the safety regulations in the book.

The second part of the answer is we do not see any evidence today that that effort has in any way reduced the kind of nitpicking safety citations that have resulted from these wall-to-wall inspections. Instead of citing employers for not having doors on bathrooms, they are now citing employers for simply having a messy floor in the bathroom, or some other thing, but they are still dealing with the bathroom. They are still concentrating on ladders, even though I do not believe there is any real hard evidence that ladders have been a major contributor toward lost-time injuries.

Senator SCHWEIKER. One of the issues that has been raised in these hearings is the tremendous increase in the number of contested citations. There has been about a 500-percent increase since 1972. Some witnesses say this is due to management wanting to fight OSHA every step of the way.

In your opinion, why do you think there has been such an increase in litigation?

Mr. MANN. We believe there has been an increase in litigation for six reasons that we can list.

One is that it is now clear that some of the standards that OSHA has originally adopted are not in fact enforceable under constitutional statutory, or for other reasons, and have been so declared by review commission, by various courts of appeals.

Rather than to go back and utilize the Administrative Procedures Act, and adopt through proper rulemaking amendments to those standards, and then again make them uniformly applicable to industry, OSHA continues to attempt to cite under many of these standards—and the crane standard is the best example—to the point where the employer who is cited has no choice. His competitors have won their cases before the review commission and their courts. They are not following the standards any more. An employer who is cited has no choice but to do the same thing in order to remain competitive. That is one principal reason.

The second thing is that oftentimes OSHA will not—and this again relates to the use of untrained personnel—they tend to cite conditions under standards that are not necessarily applicable. They utilize the 5(a)(1) general duty clause in lieu of specific standards. This creates a problem for the employer, because if he does not contest the citation, and clear up the matter, he stands with that type of record in violation, and risks repeated violations in the future, even though he was not originally in violation of the particular standard cited.

The third point is we have seen a marked increase over the past several years in the characterization of violations, that is, citations that used to be issued for other than serious or serious violations are now being cited as repeated, willful, and extensive fines being levied much more so than in the past.

The fines are now becoming so extensive in some cases that they become a real factor in the employer's willingness to take the citation.

We find that probably one of the major reasons for the increase in contests is the lack of OSHA authority at the local level to settle citations, resolve ambiguities before the contest period runs out.

We, in fact, have had the experience, on several occasions where an OSHA area director will, in fact, encourage an employer to contest a citation, protesting that he, the area director, has no authority to amend the citation once it has been issued.

We also note as a fifth reason the inability or reluctance of OSHA officials at the local level particularly to advise an employer as to the precise type of abatement that is required in order to satisfy the citation. So that employer can decide whether or not abatement is feasible, reasonable, or required prior to the end of the contest period. This is particularly so in the area of noise violations, protective equipment violations, and to some degree, machine guarding violations.

In fact, we have seen situations recently—a fastener company in Rockford, Ill., went through this experience where they actually invited the area director to please come back in and look at our machine guarding. Is it or is it not in compliance? We have done these things. We do not want to contest. We want to satisfy our requirement. We are willing to pay the fine, but we want some assurance that what we have done will satisfy you. And they refused to do that.

And finally, there are problems oftentimes with abatement dates that are set forth in the original citations, and which the area directors oftentimes are not willing to change, which often in our experience, do not really reflect the time necessary for corrections of some of the conditions that have been cited.

We do not understand, frankly, why OSHA is being so uncooperative with employers in these regards. We think if OSHA were a little more cooperative, at least on the local area, in explaining the citations, explaining what is needed to be done for abatement, that the number of contests would not be so great.

We also note that at least in the fifth region, which covers the Midwest, there was at one time, in the past year or two, a point system, which you may be familiar with, Senator, or your staff may be familiar with, under which an OSHA inspector was awarded points, based on severity of the citations that he would issue.

I think the point system—I will ask my colleague, Mr. Lies, to correct me—but I think it was five points for willful; two points for serious; half a point for other than serious; and so on.

Senator SCHWEIKER. Who awarded these points?

Mr. MANN. This was a program initiated by the area regional director, fifth region, in Chicago.

Senator SCHWEIKER. What happened to the people who got the most points?

Mr. MANN. We never found out for sure.

Senator SCHWEIKER. Prizes, or promotions, or what?

Mr. MANN. We took a deposition of the regional director in the course of a particular case where this point system surfaced, and the regional director was ambiguous on the record of the deposition as to what in fact he did about these points. But he did admit that he had this point system, and I think the implication was fairly obvious that the inspector had better not come back with a lot of nonserious violations, or he is going to be in trouble.

Those are some of the reasons.

Senator SCHWEIKER. Like a police officer quota for tickets. The same idea?

Mr. MANN. It seemed to us to be the same idea.

In fairness, Senator, I am informed, at least, that that point system has since been discontinued.

Senator SCHWEIKER. I would hope so.

Mr. MANN. Fairly recent vintage.

We do feel there are increasing numbers of contests. We are disturbed about that, because the plain fact of the matter is that our clients, and our experience is that employers are typically not contesting citations in order to get more time for abatement. That is not the problem.

The problem is that they do not know what to do oftentimes about abatement, and they have nowhere to go. It is common practice in this field, Senator, for contests to ultimately wind up in settlement agreement between counsel, Labor Department, and companies, that ultimately satisfactorily resolve the problem for all concerned, including the employees. But the local area directors simply do not have that authority any more.

Senator SCHWEIKER. Earlier in the hearing today Senator Randolph asked me to list the cosponsors of the bill. We now have 22 sponsors, nearly one-fourth of the Senate. The sponsors are Senators Schweiker, Williams, Cranston, Hatch, Church, Young, Boren, Wallop, Tower, Humphrey, Lugar, Cochran, Chiles, Garn, Schmitt, Boschwitz, Hayakawa, Simpson, McClure, Jepsen, Thurmond, Bellmon, and Nelson.

Also I have here a letter from your law firm dealing with Newport News Shipbuilding & Drydock Co., and a matter that came up during the oversight hearings. We will insert your letter and supporting documents in the oversight portion of our hearing record, as you requested.

In addition, we originally scheduled a hearing yesterday that had to be canceled. The hearing on legislation in this area for yesterday has been rescheduled for Friday, April 25, at 9:30 a.m., in this room.

Thank you very much for being patient and sticking with us to the end.

[The prepared statement of Mr. Mann, along with questions and responses and material subsequently supplied, follows:]

STATEMENT ON THE OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980 BEFORE THE SENATE LABOR HUMAN RESOURCES COMMITTEE

April 17, 1980

My name is Robert E. Mann. I am a partner of the law firm Seyfarth, Shaw, Fairweather & Geraldson. With me is Mark Lies of the firm. We welcome this opportunity to express our views concerning the proposed Occupational Safety and Health Improvements Act, Senate Bill 2153.

Since passage of the Occupational Safety and Health Act of 1970, our firm has represented scores of American business entities in their relationships with the Occupational Safety and Health Administration and have counseled many such firms with respect to the legal requirements of that Act. Based on our experience in seeing first-hand the difficulties and frustrations experienced by many responsible employers in their attempts to understand and comply with the Act, we urge the Committee to give favorable consideration to the concepts underlying this proposed legislation.

The role of the Government under the Act was, as it should be, to assist employers directly affected through research and education and by providing uniform even-handed enforcement of accepted standards to eliminate competitive disadvantages for those who undertake to comply with the Act.

Our review of testimony presented at the oversight hearings concluded last month reveals that while there is disagreement whether the OSHA Act as now constituted and administered has been effective at all in achieving the Congressional purpose, no one has shown that the efforts expended under that Act have been significantly and permanently effective in reducing the instance of occupational workplace injuries; nor has anyone coupled citation of injury statistics with any particular enforcement plan presently being implemented. It is our view that if any permanent reduction in the number of workplace injuries has been achieved, it has been achieved not as a result of present enforcement strategies of the Occupational Safety and Health Administration, but as a result of other factors, including employer-generated initiatives and employer education programs.

I. The Congress Must Take Some Action To Make The Act Effective

It is clear to us that something needs to be done with the administration of the OSHA Act because: (a) huge sums are being spent by the Government and even more money is being spent by employers in order to "abate" alleged hazards defined solely in terms of standards compliance without regard to the degree or fact of hazards actually presented. (b) Despite all those expenditures, no evidence exists to prove that the present enforcement approach has produced tangible effects:

> (i) There is substantial question whether OSHA has had any effect at all
>
> (ii) Any statistical decline in injury frequency has not been proven to be the result of the enforcement strategies presently adopted by OSHA. In all probability, such statistical decline is the result of other factors including a shift away from labor intensive industry, a general decline in the economy and employer initiatives adopted despite the OSHA enforcement scheme.

(c) The penalty-assessment approach to enforcement has, in fact, served to alienate employers from OSHA and thus has in turn defeated several purposes originally enumerated by Congress in section II of the Act:

> (i) The enforcement approach has discouraged employer efforts to undertake advances in the field of safety and health.
>
> (ii) The enforcement approach has discouraged joint labor-management attack on safety problems.
>
> (iii) The enforcement approach has discouraged employers from attempting to cooperate with OSHA in achieving permanent reductions in occupational injuries.

Among the problems associated with the present penalty collection enforcement approach emphasized by OSHA in its administration of the Act are the following:

- The current stated policy of OSHA to conduct a "wall-to-wall" inspection of an entire workplace in every instance of an employee-generated complaint, irrespective of the limited nature of such complaints, thereby interrupting the employer's operations, needlessly expending OSHA resources and alienating employer cooperation in the administration of the Act

- The unbridled use by OSHA of the so-called general duty clause in the issuance of citations thereby attempting to promulgate de facto safety standards without resort to statutory requirements of the Administrative Procedure Act and precluding notice to an employer comment on feasibility cost benefits, and actual experience of accident reduction in connection with the particular conditions cited

- Issuance of "general duty clause" citations to an employer for alleged violations of an employer's own internal safety procedures which often are more comprehensive and beneficial than existing standards thereby penalizing the more conscientious employer

- The policy of continued issuance of citations for violations of standards which repeatedly have been held unenforceable, nonmandatory, or otherwise void and of no legal effect, thereby necessitating needless litigation and related expenses

- The failure of OSHA to apply in an even-handed nondiscriminatory manner to all employers its own internal procedures for characterization of violations and assessment of penalties, thereby again generating needless litigation and promoting distrust, resentment, and suspicion of harassment among employers

- A rigid and unrealistic approach to citation and abatement of the alleged violations which does not consider previous history of total lack of accidents involving the hazard cited or the cost benefit and economic means of a particular employer to undertake proposed abatement and a timetable for completion

- The unfortunate history of local OSHA officials repeatedly embroiling themselves in labor-management controversies unrelated to safety questions

- The utilization by OSHA of untrained and undisciplined compliance officers to conduct workplace inspections, thereby failing to accomplish meaningful inspections with minimal intrusion
- The increased constraints on the authority of local OSHA officials to engage in meaningful discussions of alleged violations with employers and to engage in discussion of reasonable abatement plans for resolution of hazardous conditions, thereby again promoting unnecessary and wasteful litigation. In this connection, we would note that there is an increasing tendency of local OSHA officials, area directors, and acting area directors initially to recommend that employers contest citations which they have issued as the only means to achieve a reasonable resolution
- The policy of OSHA to decline requests for informal safety consultation services by employers without the risk of issuance of citations based upon such inquiry.

As a result of these and other abuses of the enforcement procedures presently adopted and utilized by OSHA, it is clear that the number of citations have gone up dramatically, the number of contests have gone up dramatically, and the number of final, mutually agreeable resolutions through settlement procedures has declined dramatically, again without producing any significant or permanent reduction in the number of lost time injuries. In short, the present penalty assessment ("traffic cop") approach is costly, inefficient, nonproductive and in all probability counterproductive.

II. The Proposed Amendment Is A Step In The Right Direction

(a) The concepts embodied in the Amendment, if adopted realistically, would force OSHA to direct its resources toward efforts likely to produce tangible effects by:

- (i) Concentrating on workplaces known to be higher hazards (it makes no sense at all to concentrate enforcement efforts on the largest member of particular industries without regard to individual accident rates simply because it is the largest employer in the industry).
- (ii) By streamlining its complaint-investigation efforts, i e :
    - a. Not to waste limited resources on wall-to-wall inspections based solely on a specific employer complaint. It is our experience, in fact, that oftentimes the specific complaint items are the last to be inspected and oftentimes generate no citations at all.
    - b. Obtaining prompt inspection and investigation of employee complaints by utilising prompt and formal written notice procedures rather than cumbersome on-site investigations to achieve rapid abatement of actual hazards.

(iii) By freeing OSHA technical personnel from preparation for and participation in the present time-consuming penalty collecting litigation in order to concentrate on investigation of the actual causes and preventions of accidents.

(b) The Amendment would offer employers at least a limited opportunity to attack those matters (human acts as opposed to physical structures) cited by the inter-agency task force report as the cause of seventy-five percent of injuries, without fear of subsequent citation for general duty clause or specific standard violations for attempting innovation. It would encourage employers to give appropriate priority to the high hazard conditions in lieu of attempting strict, literal compliance with the many thousands of individual standards, most of which have not been shown to be principal causes of industrial injury.

In short, the concept of the Amendment is laudible, namely, to redirect the focus of the Act toward encouragement of injury prevention rather than the present scheme of attempting to discourage noncompliance with strict, formalistic standards through the issuance of penalties.

III. Alternative Considerations

While the Amendment conceptually is a necessary first-step toward achieving the promise of the Act, the Committee should perhaps consider some additional alternatives because:

(a) Most employers obviously cannot possibly hope to qualify for the section (b) exemption because of their size

(b) The section (c) provision is unrealistic because it takes no account of the relative injury potential of various industries and also takes no account of the relative injury potential of various conditions within those industries.

(c) It could, perhaps, create a disincentive for OSHA to marshall its resources efficiently through adoption of the neutral criteria, general inspection plan approach referred to by the Supreme Court in the Barlow's decision. It is suggested that the Amendment perhaps could be recast so as to give employers a positive, attainable incentive to excel within their own industry to eliminate lost time injuries caused by particular conditions, and in order to obtain the assistance of OSHA consultation without fear of contemporaneous citation. As it now stands, an employer cannot call OSHA seeking assistance without risking possible citation and is jeopardized in attempting to be innovative in achieving reductions in lost time injuries because of OSHA's tendency to cite 5(a)(1) general duty clause violations.

IV. Conclusions

In summary, OSHA needs redirection; the redirection contemplated by the Amendment is a step in the right direction. However, many of our clients have expressed concern that the nature of the problem is so severe and the scope of the amendment is so limited that it may well be viewed as a general re-endorsement of the present approach and may therefore further polarize the parties in their attempts to achieve a common goal. The question of injury prevention urgently needs Congressional re-examination, and some bold new approaches to encourage employer affirmative action rather than to discourage or alienate employers. If the present unfortunate record of OSHA is not to be repeated over the next nine years -- billions spent, little or nothing achieved -- and Congress does not wish to place an OSHA director in every plant, it must do more to encourage employer action than is provided under the existing punitive-oriented ticketing scheme.

While many employers with whom we work on a daily basis are so shell shocked by current conditions that they tend to look upon this proposed legislation with uncertainty and some apprehension, they applaud the Committee for being willing to address these difficult and emotional issues in a constructive and creative way.

Mr. Chairman and members of the Committee, in closing, I would like to leave you with one thought.

In our final preparation for today's presentation, we realized that the basis of the apprehension of many of our clients is their concern that their inability to qualify for the 4A(c) (1) exemption provided in the proposed legislation may be cited by OSHA as a neutral administrative plan as defined by the Supreme Court in Barlow's and therefore be deemed a prima facie showing of probable cause for the issuance of a general, unrestricted warrant for a wall-to-wall inspection. They fear that the fact a company's accident rate is higher than that which Congress found sufficient to qualify for an exemption will trigger the use of the most abused weapon in OSHA's arsenal -- the wall-to-wall inspection. As you will note, our earlier testimony addressed employer's concern with the actual inspection process, which is the source of the primary problems with the OSHA enforcement scheme. We are confident that this feared, indirect consequence of the proposed legislation was not intended by Senator Schweiker and the cosponsors of this bill. However, our clients' fears may be warranted and we respectfully invite the Committee's attention to this concern.

Although we and many of our clients sincerely believe the existing situation is so deplorable that major corrective surgery would be required to redirect OSHA's efforts to be consistent with its original mandate, let us assure you that if the end result of your endeavors is nothing more than congressional direction to OSHA mandating the development of meaningful criteria for conducting inspections, then you will have taken a giant step forward in restoring the faith of the business community in the integrity of the system.

We thank the Chairman and the Ranking Minority Member of this Committee for scheduling these hearings and for affording us an opportunity to testify.

QUESTIONS

1. You express criticism of OSHA's practice of conducting wall-to-wall inspections in response to some employee complaints. You have endorsed proposed language that would limit complaint inspections to the complained of matter.

Yet, the General Accounting Office has found that when OSHA conducts complaint inspections, it very rarely issues citations for serious hazards resulting from the complained of condition. On the other hand, OSHA demonstates that its complaint inspections result in the citation of serious hazards in a significant percentage of the cases, even if those are not the hazards which are complained of.

The conclusion is that, by evaluating the complaint, OSHA can validly make judgments as to whether the conditions in that workplace are of a nature as to warrant a wall-to-wall inspection.

If we were to take this authority away from OSHA, would we not be condemning the agency to overlooking serious hazards, and conducting inspections, a large percentage of which will result in the citation of non-serious hazards, or in no citations at all?

Wouldn't this be a waste of inspection resources?

2. You, as well as other witnesses, have suggested that the exemption criteria in S. 2153 be adjusted, so that different criteria would apply, depending upon the hazardous nature of the industry, so that all employers would stand a chance of qualifying for an exemption. Under your scheme, assuming some means of accomplishing this could be found, OSHA would target for inspection, the worst safety performers in low risk industries, while it would exempt from inspection the best safety performers in high-risk industries, even though these good performers in the high-risk industries might be considerably less safe than the poor performers in the low-risk industries.

Does this not strike you as a waste of enforcement resources?

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WRITER'S DIRECT DIAL 202

May 20, 1980

The Honorable Harrison A. Williams, Jr.
Chairman
United States Senate
Committee on Labor and Human Resources
Washington, D. C. 20510

Dear Mr. Chairman:

Thank you for your May 5, 1980 letter posing two additional questions relative to Senate Bill S. 2153.

As I understand it, your first question is whether the provisions of S. 2153, confining complaint inspections to complained-of conditions, would misallocate OSHA's inspection resources; as you note, while so-called complaint items frequently do not prove to be serious hazards, OSHA has produced statistics indicating that broader inspections triggered by complaint inspections often result in the issuance of citations characterized as serious for other conditions.

Your question focuses on the core problem with current administration of the OSHA Act, the problem which S. 2153 addresses: whether current OSHA methods for scheduling inspections achieve the most efficient use of resources to eliminate workplace hazards. We believe that the practice of routinely converting complaint inspections into wall-to-wall inspections is counterproductive of the objectives of the Act, despite the statistics gathered by OSHA. Our view is based on the following observations, backed by the practical experience of many employers with whom we work;

1. OSHA, rather than individual employees, potentially is in the best position to determine what workplace conditions actually present serious hazards; as noted by various studies, including the Presidential Task Force Report, and confirmed by experience, a great majority of serious injuries result from transitory conditions or practices which are not

readily apparent to individual employers and/or employees untrained in safety-hazard recognition and unfamiliar with the experiences of other employers. OSHA, on the other hand, has the resources, the experience of observing many workplaces, and access to injury data which should permit it to identify such conditions and/or educate employers and employees in their recognition. Therefore, we believe, OSHA's inspection resources would best be allocated according to some plan designed -- presumably by OSHA -- qualitatively to search out conditions actually causing injuries rather than a plan based on ad hoc response to employee complaints. In other words, OSHA, not individual complaining employees, should be selecting workplaces for comprehensive inspections and the selection process should bear some rational relationship to the potential for finding and correcting actual hazards. It makes no sense to expend enormous quantities of inspectors' time checking for technical violations of standards when, as experience indicates, many latent hazards exist and go undiscovered until an injury occurs.

2. While it is true that major "wall-to-wall" inspections often result in issuance of at least some citations for serious violations, analysis of those citations usually reveals that:

   (a) the cited conditions amount only to technical or marginal violations of standards;

   (b) the conditions have not produced injuries in the past;

   (c) the citations reflect lack of understanding by OSHA inspectors as to the industrial processes involved; and/or

   (d) the citations do not bear upon the employer's overall safety program or give meaningful guidance which could lead to improvements. Given the vast number of standards, the virtually infinite number of variations in workplace conditions, and the differing levels of sophistication among inspectors, standards violations probably could be found in any workplace, depending on who makes the inspection. 1/ Accordingly, we believe, OSHA's statistics do not address the real question. The relevant question is whether comprehensive inspections conducted as a result of limited complaints are likely to result in identification and correction of conditions which actually are causes of serious injury. We find that such inspections do not generally achieve that result, as a practical matter, and that without some qualitatively-based inspection scheme beyond mere response to complaints, the current problems will continue to exist. 2/

3. There is no evidence that OSHA evaluates complaints qualitatively to determine whether a comprehensive inspection is warranted. The usual procedure followed by OSHA is to conduct the wall-to-wall inspection without first investigating the complaint items.

1/ For example, my colleagues and I noted what we perceived to be a number of literal standards violations as we passed along the Senate Office Building corridors on our way to the S. 2153 hearings. (Open paint cans, lack of respiratory protection in poorly ventilated areas being painted, improperly stacked materials, etc.)

2/ An unfortunate construction of the Act holds unequivocally that a violation is "serious" if it could lead to serious injury regardless of the probability that any injury will likely occur at all. e.g., Shaw Construction Inc. v OSHRC, 534 F.2d 1183 (5th Cir. 1978) at footnote 4. This rule permits OSHA broad discretion, which it often uses, to construct remotely possible chains of events leading to "serious" injury from even the most innocuous and technical standards violations. Mere reference to the number of serious citations, without regard to questions whether causes of injury actually are being identified thereby, or whether such citations result in lessened injury rates, is therefore essentially without meaning.

The Honorable Harrison A. Williams, Jr.
May 20, 1980
Page Four

> It is this procedure which so angers, frustrates and confounds employers; few employers would object -- or have valid objection -- we believe, if OSHA first would investigate the complaint items and then make a reasonable judgment whether the scope and magnitude of violations found thereby, if any, were such as to indicate the possible existence of other hazards warranting further inspection, or even a total inspection of the workplace.

In short, the fact that serious citations often are issued for conditions unrelated to complaint items, following a complaint inspection, is no justification for the procedure without a corresponding showing that the workplaces thus selected are those most likely to contain conditions actually causing hazards. The fact that the complained-of conditions usually do not result in citation is strong evidence that complaints are not the best indicia by which to target workplaces for general inspection.

With respect to your second question -- regarding the wisdom of establishing industry-by-industry exemption levels -- we believe the approach more likely would achieve the purposes of the Act than would industry-wide levels.

As you and other legislators repeatedly have observed, the task of eliminating industrial hazards requires necessarily voluntary, affirmative, effort by employers and employees. (Clause (b) (1) of Section 2 of the Act reflects that understanding.) In addition, there is an urgent need to eliminate competitive disadvantages resulting from efforts toward improving workplace safety. Finally, our experience indicates that employees who periodically set for themselves specific and reasonably attainable goals for reduction of injury frequency rates typically have much fewer workplace injuries than those who do not set such goals.

The foregoing considerations lead us to believe that the extent of voluntary compliance and employer affirmative action to eliminate hazards would increase significantly if each employer had a realistic goal to achieve, tailored to reflect the circumstances of his industry and the best safety performances in that industry. A contrary policy -- attempting to encourage employers in one industry to meet goals set with respect to other industries -- would not provide nearly as much encouragement or elimination of competitive disadvantage.

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The Honorable Harrison A. Williams, Jr.
May 20, 1980
Page Five

Since, as all agree, the need for OSHA inspections is inversely proportionate to the degree of voluntary compliance, encouraging voluntary compliance in all industries -- high risk and low risk -- should produce a beneficial effect for OSHA as well.

Our general view regarding the inspection process is that as currently applied it has little if any qualitative direction, is not identifying real hazards in proportion to the efforts and resources expended, diverts OSHA's attention away from many of the tasks it was created to perform (e.g., research, training, etc.) and, worst of all, it is discouraging, not encouraging, employers in their own efforts to eliminate hazards. We believe the concepts embodied in S. 2153 would, with some refinements, reverse this situation and thus serve to achieve the ultimate benefits of the Act.

Again, we wish to thank the Chairman for giving us this opportunity to comment.

Very truly yours,

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON

By Robert E. Mann

Robert E. Mann

REM/bsr

DISTRICT 65 U.A.W.

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April 28, 1980

The Honorable Harrison A. Williams
Chairman, Committee on Labor and
Human Resources
352 Russell Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Williams:

This testimony is being submitted on behalf of the 35,000 members of District 65, UAW. The members of District 65 are extremely concerned with what we foresee will be the adverse effects of S2153 and S1486 which are presently before this committee. While we fear the ill effects many of the provisions of this legislation would have on the health of working Americans, we are particularly concerned that this legislation exempts small shops from either full or partial coverage of the Occupational Safety and Health Act of 1970.

We have firsthand knowledge of the problems faced in small shops since nearly half of the 1500 shops our members work in employ ten or fewer workers. In addition, our members have extensive experience with a wide variety of safety and health conditions and with OSHA's ability to address these problems. They are employed in a broad range of industries from cosmetics manufacturing to warehouses, from corrugated box fabricators to small processing companies in thirty-six states, Puerto Rico and Canada. Because District 65 has been committed throughout history to organizing America's working poor, the majority of our members work in blue and pink collar occupations too numerous to list. Likewise District 65 represents Americans of every ethnic, racial and religious heritage. Approximately one out of every five members is of Hispanic origin, and one out of every four is Black. Nearly half of our members are women.

We know that millions of other American workers share our concern for the workplace hazards of the small shop. Small businesses of ten or fewer employees account for seventy-six percent of all American business establishments. They employ one out of every six working Americans. Clearly any law which would exclude, even partially, this large a group should be carefully and critically examined.

S1486 which is sponsored by Senator Church would exclude any business with ten or fewer workers from OSHA coverage if it falls within a standard industrial classification with a record of seven or fewer lost day injuries or illnesses per 100 workers. S2153 which is sponsored by Senator Schweiker would exclude any small business employing ten or fewer workers from inspections and fines if it reported no lost time accidents or injuries for the preceding year.

The sponsors of these bills claim that these efforts would allow the government to concentrate on the most hazardous shops and/or industries. They claim that such legislation would remove unnecessary burdens on the small business owner. Behind these rationales is the assumption that small businesses are really not as unsafe as large ones.

There are two major problems with this line of reasoning. The first is that the criteria used to define safe industries or shops is inadequate and unreliable. For example, the Schweiker amendment would rely on worker's compensation data and employer affidavits. It is well known that many employers will have injured workers report to work and do nothing in order to keep their lost-time accident rate to a minimum and thus reduce their worker's compensation premiums. The incentive for an employer to similarly falsify data is even greater if it means that OSHA would be prevented from inspecting the shop. In addition S2153 prescribes no penalty if it is found an employer has lied either in an affidavit or on worker's compensation reports. Nor, for that matter, can an employee or union contest the information provided by the employer in an affidavit. In effect, such a system protects a dishonest employer and yields highly questionable statistical data.

The second problem with the argument to exclude small businesses is that there is no proof that small shops are safer than large ones. In fact, there is an even greater dearth of statistical data on safety records of small shops than there is on their larger counterparts. The little statistical data that does exist indicates that small shops are hardly immune from workplace hazards. Almost 100 percent of all injuries in shops of less than 100 workers result in lost days from work. Employees in shops of less than twenty workers are more likely to have an occupational disease or injury lasting longer than fifteen days than are workers in large shops.

In either case, even if the statistical data did exist, it could not foretell whether or not there will be accidents, injuries or deaths in the future. Such laws would in effect be playing number games with workers lives.

Is there then any logical reason to exempt small shops from inspections or fines? We are particularly sensitive to the argument that small shops which are often financially marginal business are presently overburdened by OSHA fines and paperwork. The threat of a small business going under for whatever reason is not one to be taken lightly by our members. A large proportion of our membership is relatively less skilled and educated. Many of them face racial, ethnic or sexual prejudices and language barriers both in the job market and as a norm of daily living. Loss of employment is all the more frightening to them for all these reasons.

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We have yet to find, in all our experience, that any shop was forced to close because of OSHA regulations, standards, inspections or fines. We believe that there is far more to fear if the workers in small shops are denied the full strength of legal protection. Since these shops may be relatively less financially stable, fear of the company going out of business can make it more difficult for even the organized worker to push for improvements necessary to safeguard their safety and health. The smaller their numbers, the more likely they are to feel powerless and isolated.

At the same time we understand that OSHA, like any other organization or agency, must set priorities. It is especially clear that given its present inadequate staff and funding, OSHA needs to set administrative policy which will ensure that it reaches the largest number of workers and that it pinpoint specific hazardous industries for more immediate action. But it is questionable that such policies be codified, particularly since OSHA already limits its inspections of small businesses and has been doing so for years. We recently were given proof of this when an OSHA Area Office, on our request, reviewed its inspection record for the over 700 mostly small shops District 65 represents in Manhattan. Only 34 of these shops had been inspected since the law was passed in 1970.

Instead of making any real improvements in OSHA's ability to protect workers lives and health, writing exemption of small shops from fines and inspections into the law itself would in effect say to all working Americans, "If you work in a small shop your safety is less important, your life is less precious, than that of your brother or sister worker employed in a large shop."

Over the last few weeks, many of our members have written to their Senators expressing their dismay with this proposed legislation. A number of senators including Senators Schweiker and Williams wrote back saying that they were trying to improve the OSHA law by responding to the extensive criticism the agency has provoked. It is clear to us and all working Americans that this legislation shows that only the criticisms and frustrations of management have been responded to. Nowhere in these laws do we see the problems of labor addressed--the issue of inadequate funds to hire inspectors, the fact that OSHA fines are so small as to be laughable, the problems of inadequate support for worker training and education programs.

We feel that if this committee is serious about wanting to improve OSHA it should give fair hearing to both sides of this issue. We would strongly recommend that you reopen the oversight hearings and expand these legislative hearings to allow for the oral testimony of the many organizations and interests that were denied a hearing because of the woefully inadequate time alloted to testimony on these issues. A dialogue on how best to safeguard the lives and safety of over sixty million Americans should not be given such short shrift.

The Occupational Safety and Health Act was originally passed to ensure that all workers should have a safe and healthful workplace. It is a law dedicated to preventing accidents not to doing body counts of the wounded. Restricting OSHA's ability to inspect workplaces only after there have been injuries or deaths perverts the spirit of the law. It represents many steps backwards in our efforts to improve worker safety and health. We fear that this legislation would represent a retreat which would be littered with injured and maimed American workers denied full protection under the law.

Respectfully yours,

Frank Brown

Frank Brown
Organization Director

Senator **Schweiker**. The Committee on Labor and Human Resources will now stand in recess.

[Whereupon, at 3:21 p.m., the committee recessed, to reconvene at 9:30 a.m., Friday, April 25, 1980.]

OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980

FRIDAY, APRIL 25, 1980

U.S. SENATE,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The committee met, pursuant to notice, at 9:35 a.m., in room 4232, Dirksen Senate Office Building, Senator Harrison A. Williams, Jr. (chairman), presiding.

Present: Senators Williams and Schweiker.

The CHAIRMAN. This is the eighth day of this committee's examination of the occupational safety and health program, and of the various legislative proposals to amend the Occupational Safety and Health Act of 1970.

These have been enormously useful hearings. I think that our witnesses have made a great contribution to our understanding of the current administration and enforcement of the act. This understanding on the part of the committee and of the Congress is essential if we are to act responsibly with respect to the workplace safety and health program.

In addition to increasing our knowledge of the administration and enforcement of the OSHA law, these hearings have had another, very important effect. These bills before us, and these hearings have caused the working men and women of the Nation to reflect on OSHA, and to let us know how important a strong and effective workplace safety and health program is to them.

I do not think, in our deliberations on these bills, that we can ignore the fact that OSHA is a very important law to workers. Workers believe that it is the responsibility, indeed, the duty, of government to insure that their workplaces are free of unnecessary risks.

As we turn to consideration of these legislative proposals, we must be guided by that fact. Safe and healthful workplaces are, indeed, a fundamental right of workers. Our efforts must be to protect that right, and to strengthen it.

Senator Schweiker?

OPENING STATEMENT OF SENATOR SCHWEIKER

Senator SCHWEIKER. Thank you, Mr. Chairman.

Before proceeding with today's witnesses, I would like to briefly comment on several erroneous descriptions of S. 2153 that I have seen in labor union publications.

While I recognize some honest differences of opinion on whether enactment of S. 2153 would have beneficial or adverse effects, I think it is important that we at least start with a recognition of what the bill proposes.

First, the January 11, 1980, issue of the UAW Washington Report says the bill "would exempt 90 percent of all workplaces from OSHA's jurisdiction." The bill exempts nobody from OSHA's jurisdiction, it exempts nobody from a duty to comply with the law and all safety and health standards, it exempts nobody from all health inspections, from imminent danger, safety complaint, accident and followup inspections, from inspections for other hazards not adequately reflected in injury data, and from willful and repeat violations.

The statement by the AFL-CIO Executive Council, dated February 21, 1980, says the bill "takes away the statutory right of workers to safety inspections in response to valid signed complaints." The fact is the bill preserves a worker's complaints inspection in response to valid signed complaints. When the complaint is of an imminent danger or other urgent situation, the inspection is immediate. If the hazard is less than serious, there will still be an inspection unless the problem is resolved to OSHA's satisfaction.

The same statement claims the bill "mistakenly assumes that employer motivation to observe OSHA standards will not be eliminated by exemption from inspection." Not only does the bill, as I mentioned, not exempt employers from the possibility of inspection, it preserves for all employers motivation to observe OSHA standards, and increases that motivation in hazardous workplaces by increasing inspections in those workplaces.

And finally, the February 1980 issue of "Steelabor" says the bill would "eliminate all fines for safety violations in plants with 10 or fewer workers." The bill does not eliminate willful or repeat violations for any employer regardless of size. The penalty limitations for small employers are based on the total number of workers of the employer, not the number in any particular plant or workplace, and applies only to small employers who had zero serious injuries.

Mr. Chairman, I know our witness here has some time problems, so I will put the rest of my statement in the record.

I am glad to welcome you here, Senator Church.

Senator SCHWEIKER. The same publication says the bill would "change the effective definition of an occupational injury from one requiring more than first aid treatment to one resulting in at least one lost workday." There is now no "effective definition" of an injury. OSHA requires records to be kept on all injuries, lost workday injuries, lost workdays, and fatalities. These requirements remain unchanged. In addition, the primary measurement OSHA now used for its "worst first" targeting is lost workday cases, the same measurement proposed to be used by the bill—Title 29, Code of Federal Regulations, chapter XVII, part 1904—The same publication says the bill would "prohibit most comprehensive inspections and severely limit the scope of any OSHA inspection." If most inspections are taking place in hazardous workplaces, as they should, the bill would not prohibit most comprehensive inspections nor in any way limit the scope of those inspections—section 4A(a).

Mr. Chairman, these are a few of the statements I have seen which are clearly inaccurate descriptions of S. 2153. I think we will be able to better analyze the concerns expessed about this legislation if we start with accurate descriptions of what it proposes.

Thank you Mr. Chairman.

The CHAIRMAN. Yes, we do welcome Senator Church, who has a bill that has been referred to this committee, S. 1486, and we look forward to your statement, Senator Church.

STATEMENT OF HON. FRANK CHURCH. A U.S. SENATOR FROM THE STATE OF IDAHO

Senator CHURCH. Thank you very much, Mr. Chairman, and Senator Schweiker.

It is with much satisfaction that I am testifying today on the Occupational Safety and Health Act. The committee's oversight and legislative hearings on OSHA are a positive development in the effort to target the law so that it will more accurately focus on hazardous occupations affecting the safety and health of American workers.

I have always supported OSHA's basic objective: to insure safety and healthy workplaces for American workers. I voted for the original OSHA bill, which passed the Senate by a vote of 83 to 3, and by a similarly large majority in the House of Representatives.

Nevertheless, Mr. Chairman, I have long felt that the OSHA law was fatally flawed. Its most serious defect was the attempt to regulate every American farm and business, regardless of its size or character.

For this reason, I have sought to amend the law to exempt family farms and nonhazardous small businesses from OSHA, which I believe never should have been under the law in the first place.

Unfortunately, the Senate has not had an opportunity to amend the law directly. Instead, for years Congress has sought to limit the scope of OSHA by amending the appropriations bill. This is an awkward way to proceed, but some years ago, we were successful in passing an appropriations exemption for family farms.

The family farm exemption has been attached to the OSHA appropriations bill every year since. I believe that this exemption should be codified, along with an exemption for safe, small businesses as part of an amended OSHA law.

Last year saw the Senate sustain the most significant step yet taken toward excluding nonhazardous small businesses from the full jurisdiction of OSHA. The Senate voted, 54 to 38, in favor of my amendment to the OSHA appropriations bill to add nonhazardous small businesses to its family farm exemption. My amendment, in modified form, was ultimately made part of last year's appropriations act.

This appropriations act amendment was the best that the conferees could agree upon. It still contains my basic intent to exempt small, safe businesses from OSHA, but there may be a better formula for accomplishing this goal.

S. 2153, Senator Schweiker's bill, and the language contained in the appropriations act, are very different approaches to correcting this problem of OSHA's overreach. S. 2153, as I understand it, embraces all workplaces regardless of size, based upon death and injury data reported under workmen's compensation. The appropriations language limits OSHA exemptions to categories of small businesses determined to be nonhazardous by information compiled by the Bureau of Labor Statistics.

In choosing between these two approaches, I prefer the present law. Under S. 2153, OSHA inspections would occur only after deaths and serious injuries have already occurred. In addition, although workmen's compensation data is adequate in my State, it is not in a number of others. In my view, it is imperative that OSHA retain, where probable cause exists, the authority to inspect unsafe workplaces, whether small or large, in order to prevent death or serious injury.

It should be feasible, Mr. Chairman, to correct OSHA's overreach without exposing workers to unnecessary hazards. Finding the best formula is, of course, the task of this committee.

It is a task that the committee must perform with deliberation and care. If it is not done, however, I believe the entire law could be put in jeopardy.

Therefore, I am for amending OSHA so that it will better serve those American workers in need of it. The committee can count on my full cooperation in its efforts to achieve this goal.

The CHAIRMAN. Thank you very much, Senator Church.

Your advice is that we proceed deliberately and with care, and that is exactly what we are about. As I mentioned, this is the eighth day of hearings on this issue. And our search is an earnest one, toward our objective of making the enforcement of the OSHA program more effective. That is our mission, and we are doing it with as much deliberation and as much care as we can. It is pretty much an exhaustive search for ways to improve the effectiveness and efficiency of OSHA.

Senator CHURCH. I am sure of that, Mr. Chairman. I know that the committee is acting in good faith, and I appreciate the attention that you are giving to this problem. It is my feeling that the end objective of OSHA would be better-served if we could focus the law on the hazardous businesses. And I think that small business has another problem, the problem of compliance with such limited resources.

The CHAIRMAN. Fortunately, within the last 2 or 3 years, the administrators of OSHA have recognized just what you are saying and have moved in with a program of education and consultation that has greatly improved this safety and health effort. I believe that this is being increasingly understood by the business community to which so much of this education and consultation is directed.

Senator Schweiker?

Senator SCHWEIKER. I have no questions. I just want to thank Senator Church for appearing here this morning. I appreciate his interest in the matter.

The CHAIRMAN. Thank you.

Senator CHURCH. Mr. Chairman, Senator Schweiker, thank you.

The CHAIRMAN. Other bills that have been introduced and have been referred to us. Among these are bills sponsored by the Senator from Arkansas, Senator Bumpers, the Senator from North

Carolina, Mr. Helms; we have statements from these Senators, and their statements will be included in this day's record of hearings.

[The following were received for the record:]

STATEMENT OF

THE HONORABLE DALE BUMPERS

BEFORE THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

WASHINGTON, D. C.

APRIL 25, 1980

Mr. Chairman, thank you for giving me the opportunity to testify in support of my bill (S. 270) which provides that any employer who successfully contests an OSHA citation or penalty shall be awarded a reasonable attorney's fee and other litigation costs.

I commend you for reviewing the activities of the Occupational Safety and Health Administration. Secretary Marshall has taken significant steps to transform OSHA into a more effective agency. Nearly 1,000 unnecessary regulations have been eliminated. OSHA has started a new small business outreach program to instruct small businesses about OSHA regulations and to provide loans through SBA to help small businesses comply with OSHA regulations. OSHA also has developed a consultation program for employers through State Labor Departments.

However, you have also heard testimony about the expense and time spent by small businesses in contesting an OSHA citation. It sometimes takes from three to four years to try an OSHA case and the cost of this litigation can be prohibitive for a small businessman.

My bill, S. 270, would allow successful defendants of administrative and court cases brought under the Occupational Safety and Health Act of 1970, to collect attorneys' fees and litigation costs from the government. This is similar to the Equal Access to Justice bill which was introduced by Senator Domenici last session and passed overwhelmingly by the Senate, 94 to 3, last July. Senator Domenici's bill would apply to all agencies while my bill would only apply to OSHA.

Both Senator Domenici's bill and my bill would help balance the scales of justice and would give a defendant with limited resources a fighting chance against the government and its vast resources. When an employer chooses to contest a decision of OSHA, he is at a decided disadvantage. Even if he thinks he is innocent of any wrongdoing, an employer is forced to decide between acquiescing to OSHA's ruling and contesting the ruling with the possibility of losing. It is important to note that if he picks the latter alternative, he is saddled with the costs of preparing a defense -- regardless of the case's outcome.

When OSHA brings suit against an employer, the employer loses one of three ways:

First, he can comply with OSHA's citation. Second, he can contest the citation and lose, thus incurring both legal expenses and fines, as well as compliance costs. Third, he can contest the case and win, but still be forced to pay his own legal costs.

Our judicial system is supposed to be impartial. This is one blatant example where it is not. Fortunately, this is one case where the solution is clear cut and easy to achieve. We must simply give an employer the chance to win his case. This is what my bill is designed to do.

Obviously many small businesses cannot afford the legal assistance needed to defend themselves against a battery of attorneys from OSHA's Solicitors Office, at least not when legal fees start at around $50 an hour and an OSHA case takes as much time to prepare as any civil trial. OSHA's legal team will be awesome and experienced. A businessman knows that if he hires a lawyer to counteract the legal talent of OSHA, he is going to be faced with a large bill whether he wins or loses.

The few businesses that can afford attorneys' fees often find that the fees exceed the cost of complying with OSHA's decree. Thus, regardless of whether the small businessman acquiesces to OSHA in the first place, loses the case, or even wins the case, he is penalized.

Small businesses are being forced to capitulate to OSHA's rulings without a fight. We are effectively denying them their day in court because it is not worth it for them to contest OSHA's rulings.

Let me share with you an example from my neighboring State of Texas. OSHA brought a case for failure to provide a safe workplace against a contractor with only 40 to 50 employees. One of his employees was finishing some drywall work on the outside wall of an operating elevator in the lobby of a new building. The employee was specifically told by his supervisor not to work inside the elevator shaft. His supervisor left the worksite and the employee went to the building manager and asked that he turn off the elevator so that the employee could work inside the shaft. The building manager failed to turn off the elevator, and the employee was killed while working inside the shaft. Even though the employee was specifically told not to work in the shaft, OSHA brought a case against the employer. At the administrative proceeding, the Administrative Law Judge granted the employer's motion to dismiss the citation for failing to make a case without the employer ever having to present any evidence in his defense. The employer spent $3,500 to defend that case and the OSHA fine would have been $350.

Another example occurred in Arkansas. A plant was being built by several contractors. One company was hired to put a permanent handrail around the roof of a building. Approximately 40 employees were working on the roof of the plant while the handrail was being built. All of the employees had to use a small five-or six-foot path around the edge of the roof because the center of the roof was filled with equipment. One employee fell from the roof while working on the handrail and was killed.

OSHA argued that the employer should have provided safety belts to prevent the accident. At the administrative proceeding the employer pointed out that there was no place to attach the safety belts unless they were attached across the pathway. This would have caused an even greater hazard to the other employees who had to use the path, and OSHA's rules are clear that compliance with the statute does not require an employer to use a device which will present a greater hazard.

The Administrative Law Judge ruled in favor of the employer. However, the Solicitor's office appealed the ruling arguing that there must have been a safety hazard because of the issuance of the citation and the compliance officer's investigation. At the administrative proceeding OSHA only presented one witness and did not even call the compliance officer or put the citation into evidence. In this case the penalty that OSHA proposed was $350. The employer has spent over 10 times that amount in attorneys fees and litigation costs and will probably have to spend even more money.

In Kansas, another construction company was constructing a plant and borrowed a scaffold from another employer who was working on the jobsite. Two employees from the first company inspected the scaffolding to make sure that it met OSHA standards. OSHA requires that scaffolding be either tied off or overlapped for safety. This scaffolding was overlapped and appeared to be safe. Later one of the employees who had inspected the scaffolding fell from the scaffolding. OSHA brought a complaint. The employee who fell testified at the hearing that he had inspected the scaffolding, that it was overlapped and that it was safe. The OSHA compliance officer admits in his testimony that the scaffolding was overlapped. The Administrative Law Judge held against the employer and the case is on appeal to the Tenth Circuit. The attorneys fees for this case are already over $5,000. The penalty that OSHA would have assessed was $350.

Many employers are forced to hire a lawyer and defend themselves against an OSHA suit even if it would be less costly to settle. If they do not defend, they may find themselves subject to a wrongful death action or they may find their OSHA penalties and fines much more stringent the next time they are cited. OSHA has a graduated penalty system, depending on the past safety history of the employer and the number of citations he has had.

In its testimony before this committee, the Chamber of Commerce testified that one manufacturer in New Jersey recently spent $200,000 in litigation costs to successfully defend against an OSHA citation. Small businesses cannot sustain this sort of financial burden.

Mr. Chairman, this legislation will put the burden on the Government to make sure that it assumes responsibility for its actions. If the OSHA administrators know they will be accountable for attorneys fees and costs if they lose a case, they will be more circumspect in issuing citations. Government programs must become more cost efficient and accountable. Limited financial resources have made it imperative for every federal agency to allocate its resources more efficiently. OSHA has begun to analyze the cost-benefit effectiveness of its regulations. It should also analyze its litigation in the same manner to reduce unnecessary, costly litigation which in turn will prevent delays in processing OSHA cases.

OSHA should be tough on employers who endanger the safet of their workers, but OSHA should be fair to those found innocent of wrongdoing.

GEORGE MC GOVERN, S. DAK.
WALTER D. HUDDLESTON, KY.
RICHARD B. STONE, FLA.
PATRICK J. LEAHY, VT.
EDWARD ZORINSKY, NEBR.
JOHN MELCHER, MONT.
DONALD W. STEWART, ALA.
DAVID H. PRYOR, ARK.
DAVID L. BOREN, OKLA.

JESSE HELMS, N.C.
MILTON R. YOUNG, N. DAK.
BOB DOLE, KANS.
S. I. HAYAKAWA, CALIF.
RICHARD G. LUGAR, IND.
THAD COCHRAN, MISS.
RUDY BOSCHWITZ, MINN.
ROGER W. JEPSEN, IOWA

United States Senate
COMMITTEE ON
AGRICULTURE, NUTRITION, AND FORESTRY
WASHINGTON, D.C. 20510

STATEMENT

OF

SENATOR JESSE HELMS

TO

COMMITTEE ON LABOR AND HUMAN RESOURCES

CONCERNING S.1572, S.1486

APRIL 17, 1980

Remarks on S.1572, before Labor Committee

Four years ago, Congress voted to exempt all small farms from OSHA rules and regulations. This was done through an amendment to the appropriations bill for the Departments of Labor and Health, Education and Welfare. Ever since that time, these small farmers have continued to be free from OSHA rules, because each year the language of the appropriations bills has expressly prohibited OSHA from using any funds to regulate small farmers.

I believe it is high time we write this exemption permanently into the law. If we do not, the day may come when this language no longer appears in appropriations bills. Once again, small farmers will become the targets of OSHA inspectors.

Farm safety is important not just to the farmer and his employees, but to the nation as a whole. Every farm injury means less work accomplished. Less work means fewer vegetables, less meat, less fruit--in short, less food to feed the nation's people. And every reduction in the quantity of the nation's food supply means higher prices for all.

But of course it is the farmer who suffers most from farm injuries. When his harvest is poor, or the livestock go unattended, income may suffer terribly. Even temporary losses of labor could spell economic disaster for a small farm, dependent on perhaps a single crop for its livelihood. So to protect his own best interest, a farmer must make every effort to provide safe working conditions for himself and his employees. He does not need government to penalize him for a farm injury, or tell him when conditions are unsafe.

The farmer is his own best judge of how to make his operation safe. He can remember all too clearly the days of portable potties for fieldworkers and cattlemen out on the range. He doesn't forget paternalistic warnings about the hazards of slippery cow manure.

Over 90% of our nation's farms hire ten or fewer employees. And almost half of our farm labor force works on such farms. S.1572, which I introduced last summer, would permanently exempt these enterprises from OSHA regulation. It would simply write into the law the farm exemption already in effect. It is a very brief, concise bill, meant to protect one segment of the national work force from one form of excessive federal regulation.

But this is not enough. Since the original passage of the small farm exemption, OSHA seems to have acquired a peculiar suspicion of farming as a whole. Rather than reducing the number of farm inspections it makes each year, as a percentage of overall inspections it has increased them six-fold since 1975. While the total number of OSHA inspections per year has declined since FY 1975, the number of farm inspections has increased.

It is essential that we put a stop to this trend. The budget of OSHA has quintupled since 1972, and the end is nowhere in sight.

Mr. Church has introduced another bill which is a major step toward keeping OSHA out of places it doesn't belong. Not only does his bill cover small farms and businesses, but it also covers all businesses, regardless of size, if they have a favorable safety record. I am pleased to see that S.1486 is based on an amendment my good friend Dewey Bartlett introduced in 1978. The Bartlett amendment to the Small Business Authorization Act would have exempted all small businesses with good safety records. Unfortunately, this was rejected in conference with the House.

Passage of S.1486 would mark a major step toward safeguarding our citizens against the ever more intrusive fourth branch of government. No safe business or farm needs OSHA inspectors coming in and looking for problems. Certainly our taxpayers don't need to see more of their dollars being poured down the drain for such enterprises.

If this legislation is not approved by the committee, then we must take S.1572 to the Senate floor. Congress has approved this same language in the past, and I am certain that it will do so in the future. Passage of S.1572 would be one small step in the right direction. But I urge the committee to do even more, and support adoption of S.1486.

The **CHAIRMAN**. We now turn to the next listed witness, Mr. Ray Denison, legislative director of the AFL-CIO. We look forward to Mr. Denison's statement and welcome him to our committee hearing, and also his associate, Mr. George Taylor.

STATEMENT OF RAY DENISON, LEGISLATIVE DIRECTOR, AMERICAN FEDERATION OF LABOR/CONGRESS OF INDUSTRIAL ORGANIZATIONS, WASHINGTON, D.C., ACCOMPANIED BY GEORGE TAYLOR, HEAD OF HEALTH AND SAFETY DEPARTMENT; AND LARRY GOLD, COUNSEL FOR AFL-CIO

Mr. **DENISON**. Thank you, Mr. Chairman.

My name is Ray Denison. I am the director of the department of legislation, AFL-CIO. I am accompanied this morning by George Taylor, the head of our health and safety department. Perhaps, before we finish, counsel for the AFL-CIO, Larry Gold, may make an appearance and join us.

The **CHAIRMAN**. We hope he does.

Senator **SCHWEIKER**. Indeed.

Mr. **DENISON**. I am here to convey our strongest opposition to legislation amending the Occupational Safety and Health Act of 1970—incidentally, I will not read the entire statement, but I will summarize.

This committee over many decades has been the seed bed from which has grown far-reaching statutes protecting, advancing, and enriching the lives of American working men and women. One of the most significant of these laws has been the Occupational Safety and Health Act.

In the storm of debate which swirls around the pending legislation, the broad and humane policy goal of Public Law 91-596 has tended to be overlooked.

I refer to the purpose and policy set by the Congress in the 1970 legislation, "* * * to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."

To organized labor this policy cannot and should not be construed in any other way than this: The Occupational Safety and Health Act has been created by the Congress for the full protection of all workers under its coverage, not just some categories defined by occupation, or a number of employees in the workplace or on the basis of an arbitrary determination that some workplaces are more hazardous than others.

Legislation now pending before you would in effect rephrase the policy goal of OSHA to erase the word "every" and substitute "some." it would ask this committee to reject a most fundamental principle as old as the Republic—equal protection under the law.

Our comments today will be directed primarily to S. 2153 for these reasons:

One. It represents a sweeping reversal of OSHA's safety enforcement powers under the act, and in so doing would remove 9 out of 10 workplaces from equal protection under the act.

Two. It would abridge and restrict worker complaints and OSHA's response to these complaints.

Three. It would modify the penalty structure of the act.

Four. It would place reliance for achieving compliance with the act principally on voluntarism by employers.

Five. It would freeze into statute a dual method for determining hazardous versus nonhazardous workplaces in order to guide the small OSHA compliance staff to inspect the worst first.

Six. It would redefine what should be considered as a workplace.

Seven. It would raise an artificial barrier by restricting safety enforcement but not enforcement over health hazards in a workplace.

The net result of these far-reaching exemptions would be the creation of two classes of workers—a minority who would be entitled to full protections under the law, a vast majority who would not. This provides the strongest incentive for employers to do the least possible to comply with the act.

Under voluntary compliance, the advocates of S. 2153 argue that this legislation would result in better protection of workers qualifying for safety enforcement exemptions because this would stimulate voluntary compliance on the part of 90 percent of covered employers. The OSHA compliance staff could then concentrate on the really hazardous workplaces.

This assumption, like faith, is based on evidence of things unseen. Even with all the present enforcement mechanisms in place, employers are bucking OSHA. For example, in fiscal 1973, only 4 percent of total violations cited by OSHA were contested before the OSHA Review Commission. By fiscal year 1979, 21 percent of OSHA citations were contested. In round numbers, the increase in contested citations is even more remarkable–from 5,786 in 1973 to 27,735 in 1979, a 480-percent increase.

Data obtained from OSHA for fiscal years 1977 through 1979 show that only a small percentage of workplaces subjected to general schedule inspection have been in compliance, rising about 8 percent over the 3-year period: 23 percent in 1977, 28 percent in 1978, and 31 percent in 1979. The figures for these 3 years are not greatly in excess of percentages of workplaces in compliance during the earliest years of the act, which were in the range of 20 to 25 percent. In contrast, followup OSHA inspections found 90 percent or slightly more in compliance over the years 1977 to 1979, inclusive.

The lesson to be learned from these data is that when there is an active OSHA enforcement present, with the threat of unannounced inspections, most plans come into compliance, particularly when the employer knows he can expect a followup inspection to determine if he has complied with the OSHA abatement order. Where an OSHA inspector is a seldom thing, or barred, most plants are not in compliance.

The second major concept within the Occupational Safety and Health Act is prevention. The chairman of this committee said it well during the 1974 oversight hearings:

> We must remember that OSHA is the vehicle to improve safety and health in the workplace in order to reduce and hopefully eliminate the deaths and injuries for which employers and eventually society as a whole must pay.

What is the effect of this legislation on the concept of prevention? S. 2153 would virtually wipe out prevention as a major aim of the act. If an employer qualifies for the exemptions and other benefits provided by S. 2153, he need face an OSHA safety compliance officer in his workplace only if there were an accident in which one or more workers were killed, two or more hospitalized, or on a followup to a previous inspection allowed under this bill.

In effect, OSHA safety enforcement staff would be reconstituted into a nationwide accident evaluation office, where determination of the causes of an accident would be made after the fact. Is this the price workers are called on to pay in order to "save" the act?

For organized labor to accept this offer of salvation would be the basest betrayal of every worker who relies on his union and the parent organization to fight to preserve and enhance the conditions of his employment. We reject it.

The legislative history of this act is plain: to direct the Assistant Secretary to use a variety of approaches and programs set forth in the act, including the deployment of enforcement personnel to where the need is greatest, education and training of workers, informational and consulting services, working with employees and employers in order to reduce workplace hazards.

Flexibility in devising effective methods of targeting with an inspection staff of less than 1,700 is particularly important in view of the fact that data thus far developed has been insufficient to justify one particular system to be chosen over another. To freeze one approach into a statute is in error. Reversing the clear intent of the act in this area would be to substitute irrationality for reason, produce massive confusion, add to the already heavy burden of litigation carried by OSHA, and sharply increase administrative expenses. The other features of the act which also are proposed to be imprisoned in statutory form by S. 2153 can be accomplished without the need for legislation.

For example, various methods of screening the increasing volume of worker complaints can be undertaken efficiently without the need of an amendment and without circumscribing or denying the basic right for workers to file such complaints and be assured of a response by OSHA.

Joint labor management safety committees can be formed and operated without any need for statutory assistance.

Consultation services provided by OSHA are already available and operating in all 50 States. The American insurance industry collectively has a force of loss control specialists available to some employers that dwarfs in numbers the entire OSHA compliance force.

Certainly, this committee should exercise constant oversight over targeting, consultation, and other programs designed and operated by OSHA. But oversight responsibility in all of these areas can be effectively undertaken by the committee without amending the act.

On the right to complaints and inspections, I cannot emphasize too strongly the importance that our workers place on the provisions giving them or their representatives the statutory right to file complaints with OSHA over hazardous conditions in the workplace and receive a special inspection.

Under the provisions of S. 2153, there would be drastic abridgement of the rights of workers or their representatives to institute both formal and informal complaints and a giant retrogressive step toward the pre-OSHA era.

Supporters of S. 2153 downgrade the usefulness of complaints as productive of citations for serious violations, using the General Accounting Office 1979 study on OSHA Complaint Procedures as his authority. The GAO study concluded that worker complaints contained issues that neither Federal or State OSHA found to be in violation of the act.

We submit that the GAO conclusion is in error for the following reasons: The sample was too small and subject to a large probable error; no effort was made to talk to an adequate sample of workers, both unionized and not, who had filed complaints and could inform the study team what had happened as a result; the study failed to compare general schedule inspections with complaints to determine the respective rates of workplaces found to be in compliance, those which were cited for other than serious violations, and those with serious willful and repeat violations.

At the request of the AFL-CIO, the OSHA Policy Office supplied such a comparison between general schedule and complaint inspections for fiscal year 1979. The details are in table 2, attached to this testimony, but I summarize them.

The total number of general schedule and of safety and health complaint inspections are similar—23,756 general schedule inspections and 20,154 complaint inspections.

What is most revealing is that there is little difference between general schedule and complaints in the identification of hazardous workplace conditions resulting in citations—61 percent for complaint and 69 percent for general schedule. Thus, both are important tools in targeting hazardous workplaces and should continue to be encouraged by OSHA.

A major GAO recommendation to the Secretary of Labor has been ignored in S. 2153, one that would be foreclosed should it be enacted. This recommendation called on the Secretary to develop "inspection procedures that require that other potentially serious worksite hazards are covered during complaint inspections." The General Accounting Office went on to recommend that such coverage "should not be limited to high-hazard industries."

On qualifications for exemptions, possibly the most important element of this legislation, is the test used to determine whether a workplace is qualified for the exemptions under the act.

The first criterion for employers to meet in qualifying for exemptions under S. 2153 is based on establishment data to be obtained from State worker compensation systems. Assuming for the sake of argument that the lost-workday accident should be the unit of determination, are the workers' compensation systems of the States capable of supplying OSHA with lost-workday data by workplace? The answer is "No."

A recent analysis by the Employment Standards Division of the U.S. Department of Labor shows that only six States could presently furnish the required list of employers.

Even with financial incentives loosely provided to fund uniform establishment data collection systems under S. 2153, State systems resist such change, since it would lead in the direction of uniform Federal standards governing their programs. The Supplemental Data System established by BLS is facing constant difficulties in obtaining full and uniform reporting by the participating States.

On page 17 of my testimony, I detail the problems of underreporting and the variety of State systems or non-systems.

It is plain that state workers' compensation data does not constitute a valid or workable means of making a distinction for enforcement purposes between a hazardous and a nonhazardous workplace.

On employer affidavits, under the second method set forth by the bill to ascertain workplaces eligible to benefit from its exemptions, employers could file affidavits with OSHA affirming no employees had died during the previous year from an occupational injury, and that lost-workday injuries were within the range set forth in the table by number of employees.

Four million firms could qualify for an exemption under this criteria, according to BLS—an enormous paper-shuffling job for OSHA. The effect of turning OSHA's resources in the field to processing affidavits would sharply erode its ability to enforce.

OSHA estimates that about 3.4 million small employers presently exempt from BLS recordkeeping requirements would be required to maintain records under S. 2153 if they decide to file an affidavit for exemption.

The BLS reporting system has its own weaknesses. Its fatality figures vary widely, averaging each year about one-third of the National Safety Council's 13,000 workplace deaths, and about one-half of the 8,000-plus worker compensation payments of death claims. A study made by Wisconsin safety researchers covering the period 1973 to 1975 showed serious underreporting to OSHA area offices by employers. Of 235 deaths reported by four sources of data—OSHA injury logs, reports to OSHA area officers, worker compensation claims, and State health department mortality reports—only 77 appeared on OSHA logs, and only 45 of these were reported to the OSHA area office. Only the State health department picked up agricultural deaths which made up 10 percent of the overall total. It is easy to conclude that underreporting of deaths to OSHA is not confined to one State.

On the fallacy of the safe workplace, as a test of the so-called safe workplace, the AFL-CIO obtained for the year 1978 computerized printouts which listed by name and by employer all workers whose deaths were reported to OSHA as on-the-job accidents, together with data concerning previous safety records.

This provided an illuminating illustration of why the criteria for the benefits and exemptions under S. 2153 are a delusion. The computer printouts were analyzed on just one basis: Would the workplace where one or more workers were killed have been exempted under the criteria of S. 2153?

This is what the data revealed. Out of 1,203 worker deaths on which complete data were available, 489, or 41 percent of the total, occurred in workplaces which would have been exempted from general schedule inspections under S. 2153.

The members of this committee will doubtless recall the terrible tragedy which snuffed out the lives of 47 workers on an electric utility cooling tower at Willow Island, W. Va. Under S. 2153, the prime contractor would have qualified for an exemption and would have been adjudged a safe workplace and not subject to general schedule inspection.

We are making available to each committee member a State-by-State breakdown of the fatalities and their relationship to the so-called workplace, so that we will make this available on a State-by-State basis. It is quite specific.

On safety committees, the joint labor-management safety committee and consultation provisions in the bill are in reality designed for the purpose of obviating or reducing civil penalties for employers.

To the extent that safety committees can contribute to improving safety conditions in the workplace, there is nothing to hinder their institution and development right now, without any help from S. 2153. The kind of inducement this bill provides is something unions can readily grasp as not intended for their benefit. The committees are only advisory, without any right or powers in getting their recommendations adopted by management. Employers cannot be cited for willful violation of the law if they invoke a "good faith" claim that they did not think there was any problem, even though it may have been pointed out to them by both the safety committee and the consultant—the recommendations of the latter being similarly without any force under S. 2153.

In conclusion, the comments set before you for your consideration by the AFL-CIO deal with issues and proposals contained in S. 2153 which our analysis tells us would be detrimental to the safety of workers, their rights under the act, and the act's effective administration. We have included a more detailed, section-by-section analysis of the bill, as well as comments on S. 1486 and S. 1572, as part of our testimony.

Mr. Chairman, S. 2153 is unneeded, unworkable, retrogressive, antiworker, and counter to the broad goals of the Occupational Safety and Health Act of 1970. It is difficult for us not to express our indignation and outrage that the Labor movement is called upon to accept this legislative proposal as an "improvement" to the act, on the threat that something worse could result on the Senate floor if we do not acquiesce. How much additional damage could be done to OSHA by any labor-HEW rider or any other floor amendment to emasculate it would be difficult to imagine, short of wiping it off the statute books.

We ask that the law now on the books be given a chance to prove—and to improve—itself through the administrative procedures set forth in the act. It would be totally counterproductive for this Committee to consider any changes in this law at this time. The AFL-CIO urges rejection of S. 2153, any amendments thereto, and all other proposed changes in the OSHA Act now before the committee.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Denison follows:]

TESTIMONY OF RAY DENISON, DIRECTOR, DEPARTMENT OF LEGISLATION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS ON LEGISLATION TO AMEND THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, BEFORE THE COMMITTEE ON LABOR AND HUMAN RESOURCES, UNITED STATES SENATE

April 25, 1980

Mr. Chairman: My name is Ray Denison. I am the Director of the Department of Legislation, AFL-CIO. I am here to convey our strongest opposition to legislation to amend the Occupational Safety and Health Act of 1970.

This committee over many decades has been the seed bed from which has grown far reaching statutes protecting, advancing and enriching the lives of American working men and women. One of the most significant of these laws has been the Occupational Safety and Health Act of 1970.

In the storm of debate which swirls around the pending legislation, the broad and humane policy goal of P.L. 91-596 has tended to be overlooked.

I refer to the purpose and policy set by the Congress in the 1970 legislation "...to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."

To organized labor this policy cannot and should not be construed in any other way than this: The Occupational Safety and Health Act has been created by the Congress for the full protection of all workers under its coverage, not just some categories defined by occupation, or a number of employees in a workplace, or on the basis of an arbitrary determination that some workplaces are more hazardous than others.

Legislation now pending before you would in effect rephrase the policy goal of OSHA to erase the word "every", and substitute "some." It would ask this Committee to reject a most fundamental principle as old as the Republic - equal protection under the law.

Our comments today will be directed primarily to S. 2153 for these reasons:

1. It represents a sweeping reversal of OSHA's safety enforcement powers under the Act; and in so doing would remove 9 out of 10 workplaces from equal protection under the Act.
2. It would abridge and restrict worker complaints and OSHA's response to these complaints.
3. It would modify the penalty structure of the Act.
4. It would place reliance for achieving compliance with the Act principally on voluntarism by employers.
5. It would freeze into statute a dual method for determining hazardous versus non-hazardous workplaces in order to guide the small OSHA compliance staff to inspect the worst first.
6. It would redefine what should be considered as a workplace.
7. It would raise an artificial barrier by restricting safety enforcement but not enforcement over health hazards in a workplace.

S. 2153 goes to three areas: exemptions, inspections and reduced penalties.

S. 2153 would exempt most covered employers, regardless of the number of workers employed, from general schedule safety inspections, although OSHA would be allowed to make safety inspections in exempted workplaces where there has been a fatality, a serious accident, or an imminent danger situation. Follow-up inspections would be allowed under S. 2153 to check on previous permitted inspections.

Under S. 2153, workplaces deemed safe, and therefore exempt from all general schedule and most complaint inspections are those which had no occupational injuries during the year prior to the year of eligibility for the exemption, as reported by state workers' compensation agencies or failing this, had filed affidavits with OSHA demonstrating low lost workday injury rates as to number of their employees, as set forth in a table contained in the bill.

Present law dealing with worker complaints of unsafe conditions would be drastically restricted. Inspections would be permitted if the employer had first received notice of the complaint and had failed to provide "satisfactory assurances" that appropriate action had been taken to correct the violation. Response by OSHA to such complaints would be confined solely to the problem areas set forth in the complaint itself. The Secretary would be given discretion to retain present enforcement provisions of the Act with respect "...to any serious safety hazards which cannot be effectively identified by reference to occupational injury data." However, this ambiguous authority would be subject to interpretation and litigation long after the problem at hand either disappeared or resulted in an accident.

If the employer had 10 or fewer employees, or if the employer had more than 10 employees and was operating a joint labor-management safety committee, together with a regular on-site consultation program, he would be exempt from penalties for serious and other than serious violations. Other employers ineligible for the inspection exemption would still be eligible for reduced penalties for serious and other than serious violations as long as they could demonstrate that they had the labor-management safety committees and on-site consultation services.

EQUAL PROTECTION UNDER THE LAW

These are the provisions purported to meet the stated goal of S. 2153, "... to concentrate enforcement activities on hazardous workplaces and encourage self-initiative in improving occupational safety and health..."

We began our testimon, by stating the principal of equal protection under the law and the guiding policy of the OSHA Act as applied to workers in covered workplaces. S. 2153 would destroy this concept. Nine out of every 10 workplaces and 67% of the workers employed therein would be removed from the principal enforcement provisions now provided by the Act. (See Industry Sector breakdown in Table 1 attached) and with their right to complain about safety hazards in the workplace so seriously restricted as to divest it of any real meaning.

The net result of these far-reaching exemptions would be the creation of two classes of workers - a minority who would be entitled to full protections under the law, a vast majority who would not. This provides the strongest incentive for employers to do the least possible to comply with the Act.

The outrageousness of the exemption provisions written into S. 2153 has been remarked on before, but the question remains: Suppose your neighborhood had been crime-free for the past year, and the local police decided you didn't need any protection as a result of your previous record. How long would thieves voluntarily keep your neighborhood crime free? Or, how long would any of us restrain the impulse to press on the accelerator if a huge sign told us that the next 100 miles of interstate highway is free of police patrol cars?

VOLUNTARY COMPLIANCE

The advocates of S. 2153 argue that this legislation would result in better protection of workers qualifying for safety enforcement exemptions because this would stimulate voluntary compliance on the part of 90% of covered employers. The OSHA compliance staff could then concentrate on the really hazardous workplaces.

This assumption, like faith, is based on evidence of things unseen. Even with all the present enforcement mechanisms in place, employers are bucking OSHA. For example, in Fiscal Year 1973, only 4% of total violations cited by OSHA were contested before the Occupational Safety and Health Review Commission. By Fiscal Year 1979, 21% of OSHA citations were contested. In round numbers the increase in contested citations is even more remarkable - from 5,786 in 1973 to 27,735 in 1979 - a 480% increase.

In Fiscal Year 1973, serious safety violations contested by, employers represented 32% of all such violations cited by OSHA: This percentage had risen to 42% in Fiscal Year 1979. Numerically, the increase in 1973-1979 has been from 584 to 13,478, or 2,300%, much of this attributable to tougher enforcement under the present administration. (See Table 2 attached)

In addition there has been a continual rain of lawsuits by employers and trade associations, directed at enforcement and proposed health standards. There are continuous legislative proposals to weaken or wipe out the OSHA Act entirely.

Increasing numbers of workers who have been made the victims of discriminatory actions by management for participating in the Act - dismissal, downgrading, loss of seniority, transfer to lower paying jobs.

It was the bankruptcy of employer voluntarism and state administered safety programs with no enforcement teeth which presented the most persuasive argument to the Congress in 1969 and 1970 for the Federal OSHA program with strong enforcement provisions. Hearing these arguments once again is like being transported back in time to the frontier days of the pre-OSHA era.

Data obtained from OSHA for fiscal years 1977 through 1979 show that only a small percentage of workplaces subjected to general schedule inspection have been in compliance, rising about 8% over the three-year period: 23% in 1977; 28% in 1978 and 31% in 1979. The figures for these three years are not greatly in excess of percentage of workplaces in compliance during the earliest years of the Act - which were in the range of 20%-25%. In contrast, follow-up OSHA inspections found 90% or slightly more in compliance over the years 1977-1979, inclusive.

The lesson to be learned from these data is that when there is an active OSHA enforcement present - with the threat of unannounced inspections - most plants come into compliance, particularly when the employer knows he can expect a follow-up inspection to determine if he has complied with the OSHA abatement order. Where an OSHA inspector is a seldom thing - or barred - most plants are not in compliance.

The kind of voluntarism that would be established by S. 2153 would constitute a giant step backward and would deny nearly 70% of workers under the Act the basic protections they must have against safety hazards in the workplace.

PREVENTION

The second major concept within the Occupational Safety and Health Act is prevention. The Chairman of this Committee said it well during the 1974 oversight hearings on OSHA:

> "We must remember that OSHA is the vehicle to improve safety and health in the workplace in order to reduce and hopefully eliminate (emphasis ours) the deaths and injuries for which employers and eventually society as a whole must pay."

What is the effect of this legislation on the concept of prevention? S. 2153 would virtually wipe out prevention as a major aim of the Act. If an employer qualifies for the exemptions and other benefits provided by S. 2153, he need face an OSHA safety compliance officer in his workplace only if there were an accident in which one or more workers were killed, two or more hospitalized, or on a follow-up to a previous inspection allowed under this bill.

OSHA thus would be able to protect workers only after the fact. What if the Federal Aeronautic Administration were prevented by law from inspecting commerical passenger carriers except on the occasion of a crash, or a physician was barred from providing innoculation and being allowed to treat patients only after they suffered some communicable disease?

In effect, the general schedule inspection would reconstitute the OSHA safety enforcement staff into a nationwide accident evaluation office, where determination of the causes of an accident would be made after the fact. Is this the price workers are called on to pay in order to "save" the Act? For organized labor to accept this offer of salvation would be the basest betrayal of every worker who relies on his union and the parent organization to fight to preserve and enhance the conditions of his employment. We reject it.

The legislative history of this Act is plain: To direct the Assistant Secretary to use a variety of approaches and programs set forth in the Act, including the deployment of enforcement personnel to where the need is greatest, education and training of workers, informational and consulting services, working with employees and employers in order to reduce workplace hazards.

Flexibility in devising effective methods of targeting with an inspection staff of less than 1,700, is particularly important in view of the fact that data thus far developed has been insufficient to justify one particular system to be chosen over another. To freeze one approach into a statute is in error. Reversing the clear intent of the Act in this area would be to substitute irrationality for reason, produce massive confusion, add to the already heavy burden of litigation carried by OSHA, and sharply increase administrative expenses. The other features of the Act which also are proposed to be imprisoned in statutory form by S. 2153, can be accomplished without the need for legislation:

* Various methods of screening the increasing volume of worker complaints can be undertaken efficiently without the need of an amendment and without circumscribing or denying the basic right for workers to file such complaints and be assured of a response by OSHA.

* Joint labor management safety committees can be formed and operated without any need for statutory assistance.

* Consultation services provided by OSHA are already available and operating in all 50 states. The American Insurance Industry collectively has a force of loss control specialists available to some employers that dwarfs in numbers the entire OSHA compliance force.

Certainly, this Committee should exercise constant oversight over targeting, consultation and other programs designed and operated by OSHA. But, oversight responsibility in all of these areas can be effectively undertaken by the Committee without amending the Act.

Separation of Safety and Health

The evolution of knowledge about casuality of workplace accidents has demonstrated that in many instances it is difficult to separate safety from health causes in many varieties of such accidents. Many ailments, particularly those of the back and spine are defined as occupational illnesses, yet most of them are caused by the physical strain in the kind of work performed. If a worker in a motor pool is run down by a truck whose approach he couldn't hear because of high noise levels, is he a safety or health accident victim? Is a roofer who is overcome by funes of a toxic chemical he is using on the job and falls from the edge of the roof to the ground a safety or health statistic?

S. 2153, however, makes an arbitrary artificial distinction between safety and health enforcement, even though the bill does not on its face limit the latter.

Under present OSHA, one referral system (safety to health and vice versa) is in full operation and increasing in volume. In fiscal year 1979, there were 1,306 safety to health referrals, and 715 health to safety referrals, almost double those received in the previous fiscal year.

During the past several years safety inspectors have performed a most valuable service to thousands of workers exposed to asbestos by referring such situations to area office industrial hygienists for inspection and enforcement action.

The effect of S. 2153 would be to bring the program of safety referrals to a halt. In the health to safety referral area, this program would die since a safety hazard found by a health compliance officer would require a general schedule inspection to be performed. Under S. 2153, however, this could not be performed in an exempted workplace unless a death or hospitalization accident had taken place, surely a Catch-22 for the worker trapped by this legislation.

Right to Complaints and Inspections:

I cannot emphasize too strongly the importance that our workers place on the provisions giving them or their representatives the statutory right to file complaints with OSHA over hazardous conditions in the workplace and receive a special inspection.

This protection became part of the Act as a result of the field hearings conducted by OSHA in 1970, particularly those which took place in New Jersey and Pennsylvania. I should like to quote from two union witnesses to illustrate why:

Anthony Semararo, United Steelworkers, from the Fairless Plant of U.S. Steel Corporation:

> "I was working there 17 years. This is our 17th fatality. You talk about State inspectors. I think it is just somebody smuggled on the payroll of the State. It is a waste of time and money. They don't have the right to come in and run the place as they please."
>
> "I have yet to meet the joker from the State of Pennsylvania and I am at them for 6 years."

Herbert Ross of the Oil, Chemical and Atomic Workers testified in the 1970 New Jersey field hearings:

> "These laws, when we attempt to use them are so vague that when an inspector comes in at our request...they make their determinations based solely on the information supplied by the management."
>
> "After they have had their grand tour, and they have had their information supplied, all by management, they then go to the particular statute you are complaining about, and unless you can identify it and place it in the category of mandatory, then it has no effect whatsoever."

Under the provisions of S. 2153, there would be drastic abridgment of the rights of workers or their representatives to institute both formal and informal complaints and a giant retrogressive step toward the pre-OSHA era. In exempted workplaces, OSHA cannot order an inspection in response to worker complaints alleging safety hazards in exempted workplaces unless the employer is first notified and allowed to give OSHA "satisfactory assurances" that appropriate action has been taken to abate the violation. Only the failure of the employer to provide such assurance would allow an OSHA inspection.

S. 2153 also prohibits OSHA from inspecting any areas other than those covered by the worker's original complaint, severely limiting the scope of the inspection. An OSHA inspector, for example, could not inspect the worksites of subcontractors on a construction job, nor could a worker conduct an inspector to another department of a fixed site plant to show him other hazards.

But if an OSHA safety compliance officer should inspect in the absence of "satisfactory assurances" from the employer that the violations have been taken care of, or in the not too remote possibility that the employer would challenge the complaint when the OSHA inspector arrives, the employer will usually know beforehand that he was coming; and the unannounced inspection principle vital to the Act would be undermined.

It is interesting to note in this connection, that supporters of S. 2153 downgrade the usefulness of complaints as being productive of citations for serious violations, using the General Accounting Office 1979 study on OSHA Complaint Procedures as his authority. The GAO study concluded that worker complaints contained issues that neither federal or state OSHA found to be in violation of the Act.

The GAO reviewed 359 case files obtained from five federal OSHA regional offices and from three states administering Sec. 18 (b) programs in 1979. This analysis revealed that 80% of the workers' complaints did not result in a citation by the OSHA compliance officer responding to the complaint.

We submit that the GAO conclusion is in error for the following reasons:

1. The sample was too small and subject to a large probable error.
2. No effort was made to talk to an adequate sample of workers, both unionized and not, who had filed complaints and could inform the study team what had happened as a result.
3. The study failed to compare general schedule inspections with complaints to determine the respective rates of workplaces found to be in compliance, those which were cited for other than serious violations, and those with serious willful and repeat violations.

At the request of the AFL-CIO, the OSHA Policy Office supplied such a comparison between general schedule and complaint inspections for Fiscal Year 1979. The details are in Table 3, attached to this statement, but I should summarize them.

The total number of general schedule and of safety and health complaint inspections are similar - 23,756 general schedule and 20,154 complaint inspections.

What is most revealing is that there is little difference between general schedule and complaints in the identification of hazardous workplace conditions resulting in citations - 61% for complaint and 69% for general schedule. Thus, both are important tools in targeting hazardous workplaces and should continue to be encouraged by OSHA.

The Michigan State Labor Department made a corroborating statement in its comments on S. 2153: "Because of limited inspector resources, it is often up to the employees to identify and report violations of safety standards. If OSHA or MIOSHA is unable to respond to these complaints, many safety hazards may go unabated. This is underscored by statistics which indicate that 87% of all complaints received by MIOSHA are valid complaints and of these valid complaints, citations are written during 70% of the investigations. An average of 4.5 violations are found during each complaint investigation compared to 3.5 violations for all inspections."

At the time of the General Accounting Office Study the recently implemented OSHA New Directions Training program had not been undertaken. This program already has resulted in thousands of workers learning better how to institute valid complaints. It is counter productive then for the proponents of S. 2153 to seek a drastic restriction of workers' complaints just as workers are being taught increasingly effective ways of leading the OSHA compliance officers to genuinely hazardous situations in the workplace.

However, a major GAO recommendation to the Secretary of Labor has been ignored in S. 2153, one that would be foreclosed should S. 2153 be enacted. This recommendation called on the Secretary to develop "inspection procedures that require that other potentially serious worksite hazards are covered during complaint inspections" (P. 29 and P. 33, Appendix I). The General Accounting Office went on to recommend that such coverage "should not be limited to high-hazard industries" (P. 29).

Even with the protection of a union, it takes courage for a worker to file a complaint to OSHA and ask for a special inspection. He can lose his job or suffer harassment. Discharge is even more likely where there is no union.

Should S. 2153 be enacted, most workers will not write their OSHA area officer because they will know if their employer says to OSHA all is well, that will be the end of it. Either they will fatalistically accept the situation, or they will use collective bargaining, or, failing that, might in desperation, walk off the job. It's easier now, with the Whirlpool decision. The proposed abridgment of the safety complaints contained in S. 2153 may very well exacerbate labor relations. It reflects the total bias toward employers and against workers in this aspect of the so-called OSHA Improvements Act of 1980.

Qualifications for Exemptions:

Possibly the most important element of this legislation is the test used to determine whether a workplace is qualified for the exemptions under the Act.

The proposed legislation acknowledges that the small establishment is not by definition safe, but has chosen its qualifying test for its exemptions as being the employer's lost-workday injury record for the previous year. The theory behind this criterion is that lost-workdays represent a more accurate measurement of the workplace hazard than all injuries.

The first criterion for employers to meet in qualifying for exemptions under S. 2153 is based on establishment data to be obtained from state worker compensation systems. Assuming for the sake of argument that the lost-workday accident should be the unit of determination, are the workers' compensation systems of the states capable of supplying OSHA with lost-workday data by workplace? The answer is "no."

State Worker Compensation Records:

The Department of Social Security of the AFL-CIO analyzed this part of the bill (Appendix C, attached). Its findings are:

1. No state workers' compensation agency currently collects injury or lost-workday data by workplace. Data collection of this type would be overwhelmingly difficult, if not impossible.
2. In order to qualify for exemptions, employers might be induced to conceal injuries by not reporting them -- by means of encouraging workers to use sick leave or accident benefits, and accept paychecks, rather than workers' compensation.
3. Seven states do not collect any information on first injuries.
4. Twenty-four states collect data on only a portion of all injuries/illnesses that occur in a given calendar year.
5. There is no uniform procedure for identifying employers by name.
6. There are significant coverage exclusions under the various workers' compensation programs -- elective, rather than compulsory; numerical exemptions; exemption of agriculture, etc.

A recent analysis by the Employment Standards Division of the U.S. Department of Labor shows that only 6 states could presently furnish the required list of employers. The rest of them could not enter into agreements to furnish these data to OSHA for various substantial reasons.

Even with financial incentives loosely provided to fund uniform establishment data collection systems under S. 2153, state systems resist such change, since it would lead in the direction of uniform federal standards governing their programs. The Supplemental Data System established by BLS is facing constant difficulties in obtaining full and uniform reporting by the participating states.

A problem which appears insurmountable is chronic underreporting of disabling work injuries. The Social Security Administration Disability Survey published in 1979 and covering the years 1972 and 1974 revealed that only 25% of disability insurance recipients filed workers' compensation claims for total disability in 1972, and even less -- 18% in 1974. Partial disability clients filing workers' compensation claims in 1972 and 1974 were 30% and 44%, respectively. A study made several years ago by Dr. David Discher, found that 900 Oregon and Washington workers received 1,005 work injuries, of which less than one-half were reported to workers' compensation agencies.

The Michigan State Labor Department's analysis of S. 2153, states that provisions establishing reporting of injuries of 2 or more lost-workdays, will ". . . force the creation of new data systems in many states. For example, Michigan employers report only those compensable with seven or more workdays. The reporting of cases with two or more lost workdays would result in a three to four-fold increase in the number of cases now being submitted. This will place a large recordkeeping burden both on the employers who must prepare the report and the state agency that must process them."

In Pennsylvania, an injured worker must be out 14 days in order to obtain coverage for the first seven days, thus leaving an unknown but large number of 2 or more, but less than 14 lost-workdays unreported.

Illinois and Louisiana file their reports in cardboard boxes, with no statistics. Illinois is planning to computerize its record which will require 3 years before the information will be usable, according to a report by the United Steelworkers Union.

It is plain that state workers' compensation data does not constitute a valid or workable means to making a distinction for enforcement purposes between a hazardous and non-hazardous workplace.

Employer Affidavits:

Under the second method set forth by the bill to ascertain workplaces eligible to benefit from its exemptions, employers could file affidavits with OSHA affirming no employees had died during the previous year from an occupational injury, and that lost-workday injuries were within the range set forth in the table by number of employees. The employer can file an affidavit at any time during the year to take effect 5 days after filing, even if an OSHA inspection were going on.

Four million firms could qualify for an exemption under this criteria, according to BLS -- an enormous paper shuffling job for OSHA. The effect of turning OSHA's resources in the field to processing affidavits would sharply erode its ability to enforce. OSHA estimates that about 3.4 million small employers presently exempt from BLS recordkeeping requirements (11 or fewer employees) would be required to maintain records under S. 2153 if they decide to file an affidavit for exemption. And the burden of proof would be on OSHA in checking the employers' affidavits. It is a license for employers to use fraudulent reports in order to qualify for reduced inspections. It would encourage the old pre-OSHA practices of employers picking up and driving injured employees to the workplace, including those with broken arms and on crutches, even if they were unable to work, just to be there on some nitpicking assignment, or to grant them vacation with pay or medical benefits to reduce their insurance costs and protect a phony safety record.

The lost-workday measurement is only a partial means of determining the degree of hazard present in workplaces. Non-fatal work injuries without lost-workdays in most instances indicate either a hazardous situation that needs to be abated before someone gets hurt or killed, or a "there but for the Grace of God" instance where some employers involved in an accident suffer a lost-workday injury, and others do not. A more valid measurement would be total work injuries. Table 5, attached, shows the BLS rates for 1978. There is a composite rate of 9.2 accidents per 100 workers for all industry, rather than the less than 2 per 100 workers for lost time injuries which is the criterion for S. 2153.

In a letter dated September 13, 1978, from Dr. Eula Bingham to Senator Gaylord Nelson, two important points are made dealing with BLS injury data, which I believe should be made clear. The first is paraphrased, the second is a direct quote:

1. Based upon a 60,000 sample size, (now in effect) there is no reliability in rates for injuries in 3 and 4 digit categories. A sample large enough to secure a reliable standard error of 10% or less for 2 digit SIC's would have to be at least 200,000 workplaces. A 400,000 workplace sample would be required for 3 and 4 digit SIC's. This would be at odds with the concerns of the proponents of S. 2153, to reduce unnecessary paperwork burdens on the employer.

2. "If the survey is expanded and extended to small businesses for the purpose of determining exemption from OSHA inspection, reporting employers would have every incentive to drop out of the survey or to under-report injuries. The BLS survey would thus lose validity and credibility, and BLS would have to consider instituting a costly and onerous enforcement program to ensure the accuracy of the data."

The BLS reporting system has its own weaknesses. It's fatality figures very widely, averaging each year about one-third of the National Safety Council's 13,000 workplace deaths, and about one-half of the 8,000-plus worker compensation payments of death claims. A study made by Wisconsin safety researchers covering the period 1973-75 showed serious under-reporting to OSHA area offices by employers. Of 235 deaths reported by four sources of data - OSHA injury logs, reports to OSHA area officers, worker compensation claims, and state health department mortality reports - only 77 appeared on OSHA logs, and only 45 of these were reported to the OSHA area office. Only the state health department picked up agricultural deaths which made up 10% of the overall total. It is easy to conclude that under-reporting of deaths to OSHA is not confined to one state.

Another problem in the second criterion of S. 2153 is that establishment data will not be released by BLS. The firms participating in the sample are given confidentiality by BLS. To do otherwise would cause a large exodus of employers from participation.

The fallacy of the "safe" workplace:

As a test of the so-called "safe" workplace, the AFL-CIO obtained for the year 1978, computerized printouts which listed by name and by employer all workers whose deaths were reported to OSHA as on-the-job accidents, together with data concerning previous safety records.

This provided an illuminating illustration of why the criteria for the benefits and exemptions under S. 2153 are a delusion.

The computer printouts were analyzed on just one basis: Would the workplace where one or more workers were killed have been exempted under the criteria of S. 2153?

This is what the data revealed: Out of 1,203 worker deaths on which complete data were available, 489, or 41% of the total occurred in workplaces which would have been exempted from general schedule inspections under S. 2153.

The members of this committee will doubtless recall the terrible tragedy which snuffed out the lives of 47 workers on an electric utility cooling tower at Willow Island, West Virginia. Under S. 2153, the prime contractor would have qualified for an exemption and would have been adjudged a "safe" workplace and not subject to general schedule inspection.

This committee needs no further demonstration that this legislation is an unnecessary experiment with the lives and the safety of American working men and women.

Safety Committees

The joint labor-management safety committee and consultation provisions in the bill are in reality designed for the purpose of obviating or reducing civil penalties for employers.

While some of our unions have developed safety committees that are helpful in abatement and prevention of hazardous situations, there are more who do not. The principal obstacle is management's refusal to make the recommended improvements. As for the unorganized worker, this provision is devoid of value.

To the extent that safety committees can contribute to improving safety conditions in the workplace, there is nothing to hinder their institution and development right now, without any help from S. 2153. The kind of inducement this bill provides is something unions can readily grasp as not intended for their benefit. The committees are only advisory without any right or powers in getting their recommendations adopted by management. Employers can't be cited for willful violation of the law if they invoke a "good faith" claim that they didn't think there was any problem, even though it may have been pointed out to them by both the safety committee and the consultant - the recommendations of the latter being similarly without any force under S. 2153.

One of the most effective levers now in the hands of workers who participate in safety committees is that if they get a refusal or a delay or a run-around by management in responding to their recommendations, the threat of a complaint and an unannounced inspection by OSHA can in many instances accomplish their purpose. One illustration will suffice:

This is the account of a tragic 12-year experience in a Republic Steel plant located in Buffalo, New York, when United Steelworkers Local 1743 attempted to abate the hazard of molten metal water explosions during the iron melting process in the plant.

In 1967 one man was killed and three other burned in such an explosion. In 1969, the local, through the union-management Safety Committee tried to persuade management to abate this dangerous situation, without success. Another explosion occurred in 1979, and a worker received second degree burns over 20% of his body, and was stranded in the steam for 30 minutes because means were lacking to effect a rescue.

After agreeing to eliminate the hazard, management reneged even though the union gave them every opportunity to do so without resorting to OSHA. Management also turned down an offer by the union to bring in a NIOSH health hazards evaluation team and abide by its recommendations.

The final OSHA inspection, aided by union documentation consisting partially of the minutes of the safety committee meetings written by the employer, resulted in Republic Steel being cited for 3 willful violations and fined $23,000. The hazardous situation was eliminated. Under S. 2153, outcome of this 12-year effort by the union would have been total frustration. There would be no incentive for the employer to clean up the workplace, and workers' voice in their own safety and health would be reduced or eliminated.

Definition of Workplace:

What constitutes a workplace for the purposes of the bill? S. 2153 states that separate activities performed at a single physical location would be defined as separate workplaces. Different operations, such as a coke oven, or a rolling mill in a steel plant, a machine shop in an oil refinery, sub-contractors on a large construction job could either be protected under the present Act or divested of such protection, depending on the number of lost-workday injuries in each operation. Thus employers could fix their own definition of workplace to exempt as many of their activities and workers as possible.

Conclusion:

The comments set before you for your consideration by the AFL-CIO deal with issues and proposals contained in S. 2153 which our analysis tells us would be detrimental to the safety of workers, their rights under the Act and the Act's effective administration. We have included a more detailed section analysis of S. 2153, as well as comments on S. 1486 and S. 1572 as part of our testimony.

Mr. Chairman, S. 2153 is unneeded, unworkable, retrogressive, anti-worker, and counter to the broad goals of the Occupational Safety and Health Act of 1970. It is difficult for us not to express our indignation and outrage that the labor movement is called upon to accept this legislative proposal as an "improvement" to the Act, on the threat that something worse could result on the Senate floor if we do not acquiesce. How much additional damage could be done to OSHA by any labor-HEW rider or any other floor amendment to emasculate it would be difficult to imagine, short of wiping it off the statute books.

We understand the difficulties faced by this Committee, subjected as it is now to employer complaints as to the law's administration.

But, let me say that workers and their unions believe OSHA is good for them in the workplace. Otherwise, why this outpouring of unions here to defend the Act, with chapter and verse as to why they believe it is good for them?

Nevertheless, we believe it is incumbent upon OSHA to do those things which would assist this Committee and the Congress -- not to mention the general public -- in making a better and more informed determination of the effectiveness of the Act's administration.

1. A regular report submitted to the Committee on the progress of developing a more effective means of concentrating enforcement on the most needed areas, as called for in the legislative history of the Act;
2. The results of enforcement programs in the workplaces and industries which have been chosen as the primary targets of the OSHA enforcement effort; and
3. A report on the manpower needs of OSHA to make its effects more widely felt among a larger number of workplaces which may not experience a general schedule inspection for years.

In fiscal year 1978, the per capita effort to administer OSHA was about $2.60, as compared to $250 per worker for the Mine Safety and Health Act, for example. Somehow this Committee must assist making these needs known for a competent, skilled staff to make this Act more widely felt.

In conclusion, the AFL-CIO strongly urges the Committee to digest the mass of testimony provided at these oversight and legislative hearings. We urge that the Committee reflect on the 10-year history of this law and on the relentless campaign by its opponents to weaken, to dismantle, to destroy OSHA. We ask that the law now be given a chance to prove -- and to improve -- itself through the administrative process set forth in the law. It would be totally counter-productive for this Committee to consider any changes in this law at this time. The AFL-CIO urges rejection of S. 2153, any amendments thereto, and all other proposed changes in the OSHA Act now before the Committee.

AFL-CIO SECTION BY SECTION ANALYSIS OF S. 2153

Sec. 4A(a)(1). This section exempts safety inspections. However, the distinction between safety and health is not clearcut. For example, hazards related to inadequate personal protection and asphyxia from toxic gas exposure may be considered safety or health problems. Workers will have difficulty determining exemption status of hazardous conditions. OSHA administrative problems associated with such determinations can be expected.

Sec. (a)(1)(A). This section provides for safety inspections for determining the causes of a serious workplace accident which results in a fatality or multiple hospitalizations. The scope of the investigation appears limited to the causes of the accident. Wall-to-wall inspections triggered by accident investigations as now conducted, are not provided for. Also, serious accidents which do not result in fatalities or multiple hospitalizations could not be investigated.

Sec. (a)(1)(B). This section provides for safety inspections for determining the existence of an imminent danger or "other hazard so serious in nature that it warrants the expeditious attention of the Secretary." This latter provision for hazards "so serious" has no basis in the present Act and is completely ambiguous. Also, such language assumes that a determination of seriousness can always be made in absence of an inspection. Legal challenges (including warrant requests) to the Secretary's authority to inspect can be expected, effectively barring inspections and tying up OSHA's legal resources.

Sec. (a)(1)(C). This section prohibits automatic inspections in response to worker complaints. OSHA must notify employers of complaints and could only inspect if the employer failed to give adequate assurances that appropriate abatement action had been taken. This section effectively gives employers advanced notice that a complaint has been filed with OSHA and that an inspection may be imminent, contradicting a fundamental priciple of the original Act. No advance notice is a principle held strongly by workers. Most workers file OSHA complaints only after getting no response to direct complaints to management. If workers expect OSHA complaints to be turned over to employers, rather than investigated, there is little incentive to file complaints. The section assumes that the determination of whether assurances are satisfactory can always be made without an inspection. No provisions are included for routine follow-up to check the validity of employer assertions. Since the term satisfactory assurances is so vague, legal challenges to the Secretary's denial of such claims can be anticipated both in Review Commission proceedings and warrant cases delaying inspections and/or abatement of hazardous conditions.

Sec. (a)(1)(D). This section provides for follow-up inspections to determine abatement of a cited violation. Other hazards not cited during the original inspection could not be cited during follow-up inspections.

Sec. (a)(2). This section retains the Secretary's authority to take all actions authorized by the Act with regard to health hazards, and retains full authority for "serious safety hazards which cannot be effectively identified by reference to occupational injury data." This latter provision is highly ambiguous; no specific hazards or industries meeting this definition are listed in the bill itself. As with other ambiguous language, challenges to the Secretary's interpretation in implementation can be expected, tying up legal and technical resources.

Sec. (a)(3). This section limits the scope of inspections to "the purpose of such inspection or investigation" for inspections covered in paragraph (1) and (2). The Secretary retains enforcement authority for any "other safety violation found during the normal course of conducting the inspection or investigation within such scope". This provision would have a severe impact on OSHA enforcement. Many wall-to-wall inspections conducted by OSHA would be effectively banned. Employee representation on walkarounds would be severely limited. Hazards pointed out by employees in operations not covered by the scope of the planned inspection could not be investigated. Complaint inspections, which frequently result in many cited violations outside those contained in the original complaint, would be seriously undermined. These limitations on inspection scope apply not only to safety inspections but health inspections as well. It appears that industrial hygienists could not cite employers for safety violations found during health inspections, since such problems would not be included in the original scope of health inspections. Restrictions on inspection scope will result in underutilization of inspection resources, cause severe administrative problems and be subject to extensive litigation.

Sec. (a)(4). This section defines a workplace for the purposes of the bill. Workplace is defined as a single physical location where business is conducted. Where activities are physically dispersed, workplace includes all locations where the activities are performed. Also where distinctly separate activities are performed at a single physical location, each activity is treated as a separate workplace. The definition closely mirrors the definition of establishment outlined in regulations for maintaining the log of occupational illnesses and injuries (§1904.12). However, both definitions are vague and subject to broad interpretation by individual employers. Activities in separate locations could be combined, high injury rates in individual locations offset by lower injury rates in other locations with the "total workplace" exempt from coverage. Similarly, treatment of separate activities as separate workplaces could result in the exemption of some operations in a plant and the coverage of others. Some workers would be protected, others would not. Employers have a great incentive to define workplace in a manner to assure that the greatest number of employees and activities are exempted. Changing and variable definitions of workplace would cause administrative chaos with limited avenues for practical review of the validity of such definitions.

Sec. (b). This section sets forth provisions for exemptions based on state worker's compensation data. Employers would be exempt if not contained on a list prepared annually by the state worker's compensation agency. All employers reporting injuries resulting in two or more lost work days must be included on the list. Worker's compensation data is reported by employer, not by workplace as defined by this bill. For most states, worker's compensation data is inadequate to reliably determine exemptions. Many states have reporting exemptions based on size, fail to include agriculture workers, and require reporting only for injuries resulting in multiple lost work days (more than two). Injured employees kept on the job, transferred to light duty or maintained on the payroll would not be picked up in worker's compensation reports as lost workday injuries. As non-lost work day injuries, these injuries would not be considered in determining employer exemptions. Currently practiced to reduce worker's compensation premiums, payment and keeping injured workers on the job could be expected to become more widespread as employers attempt to qualify for exemptions from OSHA.

Sec. (c)(1). This section provides for a second "sort" for employers not qualifying for exemption under the worker's compensation determination. Employers qualify if during the preceding year, no fatalities and a number of lost workday injuries less than or equal to that specified in the bill for workplaces of that size, were reported. The table of lost workday cases appears to set an allowable limit of approximately 2 per 100 workers, about half the national average determined by the BLS survey. This determination of safety ignores inherent problems with the reliability of the BLS survey, ignores serious injuries not resulting in lost time, assumes that lost work day cases for one year reflect safety for the next and sets a rate of 2 lost workday injuries/100 workers as an acceptable level of protection. The definition of lost workday is defined as an injury resulting in one or more lost workdays, as compared with the definition of two or more lost workdays for the worker's compensation exemption. The bill is not clear whether lost workday includes both time away from the job and restricted activity. Such a definition would be consistent with the BLS survey and record keeping definition, but at odds with definitions of lost workdays utilized by worker's compensation agencies, where restricted activity would not be included.

Sec. (c)(2). Employers may claim exemptions by filing affidavits with OSHA that they meet the requirements for exemption set forth in Section (c)(1). A copy of the affidavit must also be posted in the workplace. Since the worker's compensation sort will be unworkable for determining most workplace exemptions, OSHA will be faced with the task of processing millions of affidavits. Inspection and other program resources will be diverted from enforcement and regulatory activities to those of auditing and clerical tasks. In the absence of inspections, no workable means exists for determining the validity of employer's affidavits.

Sec. (d)(1)(A). This section eliminates penalties for serious and other than serious violations of a safety standard or duty for exempted employers who maintain an advisory safety committee and a consultation program. Requirements for the committees and consultation program are spelled out in sections (f) and (g). This section effectively penalizes workers who are active in union or labor-management safety committees. For exempted employers, no serious threat of safety inspections nor penalties for serious violations would exist. Workers in those 90% of workplaces exempted by the bill would lose their most effective rights and weapons under the Act. Valid determination by OSHA, whether employers were meeting requirements for penalty exemption would be burdensome, complicating the enforcement process.

Sec. (d)(1)(B). Small employers (employing 10 or fewer) would be free from all penalties for serious and other than serious violations of safety standards if they qualify for exemption under the bill. This provision removes virtually all incentive for small employers to provide a safe and healthful workplace, and effectively penalizes workers who work in small shops.

Sec. (d)(2). Employers who do not qualify for exemption, but who maintain an advisory safety committee and consultation program, are granted an automatic penalty reduction for serious and other than serious violations of safety standards. Reduction of penalties for non-exempt employers, seems to fly in the face of the purpose of the bill - putting enforcement pressure on hazardous workplaces. As a financial incentive, reductions are inadequate to encourage compliance and such provisions will only complicate OSHA enforcement.

Sec. (e). This section defines time frames for filing affidavits and establishes their effectiveness. Affidavits are effective for one year commencing April 1 based on injury experience of the preceding year. Also, affidavits filed after April 1 go into effect 5 days after filing and remain effective until the following March 31. These time frames give OSHA little time for processing affidavits. Any determination of the affidavits validity before it becomes effective would be impossible. With filing of affidavits allowed at any time, employers could interrupt ongoing enforcement activities at any time, by merely claiming exempted status. Since qualification is based on only the previous years experience, even where fatalities, multiple hospitalizations, or serious injuries took place, firms would maintain their exempted status until March 31st, denying workers full protection under the law.

Sec. (f)(1)(A)-(E). This section sets forth criteria for safety committees which must be met to qualify for penalty limitations. The employer must consult with and respond to the committee; the committee must meet regularly; employer membership can not exceed employees membership; employee members must be selected by unions or an employee selection process; employee representatives may chose not to participate thereby cancelling the employers qualification for penalty limitations. The bill essentially tries to legislate labor-management cooperation ignoring all facts and history of labor relations. Committees are given no power, and no requirements are imposed for employers to comply with committee recommendations. By eliminating a strong OSHA enforcement presence (exempting most employers from most safety inspections, and eliminating penalties for most violations), the bill undermines successful operations of safety committees as presently practiced. Since worker participation on committees results in employer penalty exemptions, workers may choose to forego participation to retain a greater threat of OSHA enforcement. In summary, nothing in this section or the bill assists workers in their efforts to secure safe conditions on the job.

Sec. (g)(1),(2),(3). This section outlines qualifying criteria for consultation programs. State or federal consultants, worker's compensation carriers and certified health and safety professionals meet the criteria. In addition, OSHA would assume the burden for establishing competency requirements for other individuals, adding a certification responsibility to the agency's tasks. Consultants must conduct an annual review of plant conditions and report findings to the employer and to the safety committee. Recommendations of the consultant are not binding on the employer.

Sec. (h)(1). This section requires maintenance of a variety of records to verify claims of exemptions from inspections or penalties. The Secretary is provided access to the records. Since the Secretary is prohibited from inspecting exempted workplaces except in limited circumstances, records would have to be obtained under implementing regulations or subpoena. Without an inspection, verification of records' validity through conversation with employees or employee representatives would be difficult to make. No provisions are made for employee or employee representative access to these records. Thus, workers would be denied access to records necessary for determining employer compliance with exemption provisions.

Sec. (h)(2). This section provides for determination by the Secretary that employers claiming exemption are not qualified, and requires the Secretary to notify the employer of that ruling. Employer contest of the ruling can be made only to the Review Commission in conjunction with contests of citations, abatement orders or penalties. Employer contests of exemption determinations will lengthen and complicate already overburdened Review Commission process. If the Secretary's determination is overturned, citations issued during inspections disallowed for exempted firms would likely be cancelled. No abatement of serious hazards would be required. Inspection and legal resources would essentially be wasted.

Also, despite language limiting review to the Review Commission, challenges to exemption rulings are certain to be sought through warrant procedures. Already a resource draining and inefficient process, warrant cases involving ambiguous provisions of the bill would be even more complicated.

Sec. (h)(3). This section prohibits the use of consultant's and safety committee reports and recommendations, and employer assurances as evidence for establishing willful violations if the employer believed in good faith that he was not violating the law. This provision would disqualify much evidence currently utilized to establish willful violations. Employers are essentially given a blanket defense to all willful violations, since it is extremely difficult to determine bad faith. Combining the impact of this section and others eliminating penalties for serious and other than serious violations will result in few, if any, penalties assessed for any violation of the law.

Sec. (h)(4). This section relieves consultants and safety committee members of liability for activities conducted under this bill. No parallel relief is given OSHA compliance officers whose ability to perform their duties is seriously compromised by this bill.

Sec. (i). This section provides for the Secretary to: assist state compensation agencies; report to the Congress on state worker's compensation agency participation; advise employers and employees on amendments to the law; require adoption of similar provisions by 18(b) states; and explore other means of voluntary compliance.

APPENDIX B

S. 1486 "Exempting Family Farms and Non-Hazardous Small Businesses from OSHA" and S. 1572 "Family Farm Occupational Safety and Health Amendment of 1979"

Neither of these attempts at amendments are new; neither of them will improve conditions for the affected workers. S. 1486, a recycled small business bill introduced by Senator Church, proposes to exempt so-called, non-hazardous small businesses which employ 10 or fewer employees as well as farming operations of the same employment size. Similarly, S. 1572, by Senator Helms, proposes to exempt family farms with 10 or fewer employees that maintain no temporary labor camp from total coverage under the OSHA Act.

Like S. 2153, these two bills, affecting millions of workers, are based on the untenable principle of "unequal protection under the law." And like S. 2153, no sound rationale exists for either the principles or methods employed for determining exemptions in the two bills.

Exemption of family farms under S. 1486 and S. 1572 is sought to codify existing annual restrictions on OSHA enforcement imposed by amendment to Labor-HEW Appropriations. According to Senator Helms, the vigilance of stalwart family farmers in protecting employees obviates the need for federal protection to assure the safety and health of farmworkers.

Unfortunately, the facts do not support the view that small family farms are inherently safe. The Department of Agriculture 1979 Census estimates that 99% of regularly employed farmworkers and 75% of seasonal workers are employed on farms with 10 or fewer workers. Approximately 2.5 million workers would be exempt from OSHA protections under the Helms and Church bills.

National Safety Council statistics show that while farmworkers account for 4.4% of the national workforce, these workers carry an unequal burden of 16% of the nation's fatalities and 9% of all disabling injuries (NSC, 1971). Simiarly, the National Center for Health Statistics reported that in 1975 agriculture workers suffered 200,000 disabling injuries and 2100 fatalities, with an estimated rate of 58 deaths per 100,000 workers, compared with the national average of 15/100,000 workers. Such rates give agriculture workers the dubious distinction of employment in the third most hazardous industry, with only construction and mining industries experiencing higher fatality rates. Because of these serious injuries, exposures to toxic pesticides and poor working/living conditions, the 30% of farmworkers who are migrants can look forward to a life span 20 years shorter than others in this country.

By totally exempting family farms from OSHA coverage, S. 1486 and S. 1572 not only strip farmworkers of their rights to inspections and enforcement actions, but all other protections provided by OSHA. Training and education presently conducted under the OSHA sponsored New Directions Program would be prohibited. NIOSH Health Hazard Evaluations and other programs would be out of the reach of these workers. Those thousands of pesticide poisoned and injured farmworkers would have no redress under this legislaton and no hope of improving their working conditions.

Provisions of S. 1486 exempting defined small businesses from OSHA are equally lacking in sound justification and as destructive as those exempting family farms. Under S. 1486, small businesses employing 10 or fewer, within an industry having an occupational injury/illness rate of 7 or less per 100 full-time employees determined by the 1976 BLS survey at the 3 digit SIC level, would be exempt from the law. As pointed out by the AFL-CIO in comments on earlier small business bills, this method of exemption is unreliable and insensitive.

Because of pressure by the business community, the number of employers required to make reports for the BLS survey has been reduced significantly -- from 191,000 to 60,000. This cutback has indeed reduced paperwork for small employers, but has left a sample too small to provide reliable data on injury/illness rates in small establishments (10 or fewer) for most two, three or four digit SIC's.

Beyond the unreliable estimates, still other problems exist. Hidden within the broader two and three digit SIC's with illness/injury rates of 7 or less per 100 employees are many 4 digit sub-classifications with much higher rates. Industries such as commercial printing, alkali and chlorine production, poultry plants and grain elevators with illness/injury rates exceeding the cutoff by several fold, are obscured beneath two and three digit "non-hazardous" SIC's.

Moreover, because of the long latency associated with the occurance of many occupational diseases, no BLS survey can reflect the incidence of job-related illnesses.

Annual reclassification of hazardous and non-hazardous firms proposed by S. 1486 promises to be an administrative nightmare. Enforcement cases involving contested citations take several years. Total exemption from coverage anticipated by this bill would render these cases moot with a shift of a hazardous firm to non-hazardous status. No abatement of hazards would be required under the law.

All other programs conducted under the authority of the Act, such as training and education and NIOSH investigations would be similarly impacted. For workers employed in these businesses, meaningful participation in the Act, and the building of ongoing local health and safety programs would be impossible.

All of these factors render the proposed system of exemption totally unfounded and unworkable.

Despite recent Congressional attempts and partial success at imposing restrictions on OSHA coverage in small business, through floor amendments to OSHA Appropriations and Small Business Authorization bills, Congressional support for small business exemptions is by no means universal. On the contrary, where careful review and consideration of the Act and its impact on small business has been conducted, statutory exemptions have failed to gain support. In its 1977 report on the Impact of OSHA - Small Business, the House Subcommittee on Energy, Environment, Safety and Research of the Small Business Committee concluded that: 1) There are in existence unsafe and unhealthful and ever dangerous working conditions in some small businesses across the country; 2) further exemptions under the Act by size of business would be contrary to the purpose of the Act, and are not in the interest of small business (emphasis added); and 3) the shift in OSHA priorities, accomplishes for small business what exemptions under the Act by size of business proposed to accomplish in a less constructive manner.

The AFL-CIO believes that the record of these Senate hearings on S. 1486 and S. 1572 should lead this Committee to the same conclusions -- that workers employed in small business (including farmworkers) should not be denied equal protection under the law, and that administrative programs tailored to these operations are far more appropriate than wholesale exemptions from the law.

APPENDIX C

Background Report
Workers' Compensation System Data and S. 2153
Prepared by Department of Social Security, AFL-CIO

Analysis

(1) The bill would require that a listing of all covered employers reporting injuries to the state workers' compensation agency be forwarded by the state to the Secretary of Labor. It further requires that all employer workplaces where injuries occurred should be on the list -- with only those "workplaces" not on the list being exempt from OSHA inspection. Further, workplaces on the list could qualify for exemption according to the number of employees (see table above). Thus, the state agency would be required not only to collect and report data by employer -- even though many states currently do not -- but also by "workplace" as defined under the Act.

The definition of "workplace" provides for numerous workplaces ("each activity") under one roof, and workplace identification for reporting purposes would require the states to collect and report injury data in each of them, not just by the name of the employer who controls all of the workplaces. The bill does not specify who would define physical workplace boundaries or workplace by "activity." The states would be required to list injuries in potentially hundreds of thousands of workplaces to determine which workplaces were exempt. No state workers' compensation agency currently collects injury or lost workday data by "workplace." Data collection of this type would be overwhelmingly difficult, if not impossible.

(2) In order to qualify for exemptions, employers might be induced to conceal injuries by not reporting them. Reporting could be avoided if employers encouraged workers to use sick leave or accident benefits or provided injured workers with paychecks rather than workers' compensation. Most workers would prefer to take sick leave or full pay for short-term injuries, because they would be reimbursed full salary, rather than the partial payments of workers' compensation. But this choice of workers should not be the basis for determining an injury-free environment.

(3) Seven states do not collect any information on first injuries. At least some information is provided from the first report of injury form in 43 states, although this information may be coded and processed in an agency other than workers' compensation, such as Departments of Labor or Health. States not collecting such information are: Alabama, Connecticut, Illinois, Louisiana, New Hampshire, Oklahoma, Rhode Island and South Carolina.

(4) Reporting procedures among the 43 states vary to such an extent that any uniformity in data is impossible to obtain.

a. 24 states collect data on only a portion of all injuries/illnesses that occur in a given calendar year:

-- 17 states collect information essentially for all injuries/illnesses.

-- Five collect information for all cases except certain "medical only" cases.

-- Two exclude cases with less than one day lost time.

-- Four exclude cases with less than two days lost time.

-- One excludes cases cases with less than three days lost time.

-- Five exclude cases with less than four days lost time.

-- One excludes cases with less than six days lost time.

-- Six exclude cases with less than eight days lost time.

-- At least two states collect information on a sampling basis only.

b. There is no uniform procedure for identifying employers by name:

-- 15 states do not have employer identification codes. However, seven of these states do use the employer's name.

-- 12 states use the employer's unemployment insurance (U.I.) account number, but some cannot be matched with the U.I. computer files.

-- 10 state systems use employer identification numbers developed by the particular state agencies which are not related to any system used by the federal government.

-- Two states use the Federal Employer Identification number (I.R.S. number).

-- Two use dual employer identification codes (the I.R.S. number and their own unique identification number).

3. There are significant coverage exclusions under the various state workers' compensation statutes:

-- Coverage of employers is elective rather than compulsory in New Jersey, South Carolina and Texas.

-- Fourteen states have numerical exemptions. These exemptions range from employers with one employee to employers with fewer than six employees.

-- Other exemptions applying to small establishments or employers include agricultural and casual employees, employee of religious and charitable organizations, etc.

TABLE 1

IMPACT OF S. 2153 (SCHWEIKER BILL) ON OSHA COVERAGE OF WORKPLACES

SECTOR	TOTAL FIRMS	TOTAL WORKERS	Eligible for Exemption from General Schedule Safety Inspections				Fully Covered Under OSHA			
			# Firms	% Total	# Workers	% Total	# Firms	% Total	# Workers	% Total
TOTAL PRIVATE SECTOR	4,308,000	65,220,000	3,886,000	90	43,646,000	67	422,000	10	21,574,000	33
AGR.	73,823	1,080,134	62,586	84.8	688,368	63.7	11,237	15.2	391,766	36.3
OIL & GAS EXT.	15,594	322,952	12,171	78.0	171,872	53.2	3,423	22.0	151,080	46.8
CONTRACT CONST. .	439,381	3,571,974	360,447	82.0	2,143,384	60.0	78,934	18.0	1,428,590	40.0
MFG.	327,850	19,638,853	229,504	70.0	8,912,364	45.4	98,346	30.0	10,726,489	54.6
TRANS. & PUBLIC UTILITIES	166,465	4,030,480	132,990	79.9	2,154,982	53.5	33,475	20.1	1,875,498	46.5
WHOLE-SALE TRADE	375,077	4,562,082	324,783	86.6	3,338,190	73.2	50,294	13.4	1,223,892	26.8
RETAIL TRADE	1,263,377	13,384,271	1,176,294	93.1	10,903,510	81.5	87,083	6.9	2,480,761	18.5
FINANCE, INS., & R. E.	413,128	4,568,789	402,466	97.4	4,399,337	96.3	10,662	2.6	169,452	3.7
SERS.	1,233,652	14,059,994	1,184,950	96.1	10,933,954	77.8	48,702	22.2	3,126,040	3.9

Source: U.S. Dept. of Labor (DOL), Bureau of Labor Statistics, 1978 Annual Survey.
U.S. Dept. of Commerce (DOC), Bureau of the Census, 1977 County Business Patterns.
U.S. Dept. of Agriculture, Statistical Reporting Service, Special Tabulations of July 1977, Quarterly Agricultural Labor Survey. Farms with 10 or fewer workers are exempted from OSHA regulations and are not included in the above estimates.

Prepared by the Office of Statistical Studies and Analysis, Occupational Safety and Health Administration (OSHA),
[illegible]

TABLE 2

VIOLATION INFORMATION BY FISCAL YEAR

FY	TOTAL VIOLATIONS	TOTAL CONTESTED	TOTAL SERIOUS VIOLATIONS	TOTAL SERIOUS CONTESTED	SAFETY SERIOUS VIOLATIONS	SAFETY SERIOUS CONTESTED	HEALTH SERIOUS VIOLATIONS	HEALTH SERIOUS CONTESTED
73	135760	5786 (4%)	2090	670 (32%)	1825	584 (32%)	265	86 (32%)
74	286405	7781 (3%)	4194	1017 (24%)	3634	927 (25%)	560	90 (16%)
75	314519	13409 (4%)	6624	2092 (32%)	5480	1796 (33%)	1144	296 (26%)
76	443974	27938 (6%)	16393	5790 (35%)	12995	4730 (36%)	3398	1060 (32%)
77	179308	17710 (10%)	26202	8365 (32%)	19969	6225 (31%)	6233	2140 (34%)
78	135097	24712 (18%)	38341	16731 (43%)	27986	11785 (42%)	10355	4946 (47%)
79	133990	27735 (21%)	43992	19159 (44%)	32108	13478 (42%)	11884	5681 (48%)

Source: Office of Management Data Systems

TABLE 3

"COMPARISON OF GENERAL SCHEDULE WITH COMPLAINT INSPECTION WITH REGARD TO STATUS OF COMPLIANCE - FISCAL YEAR 1979"

GENERAL SCHEDULE INSPECTIONS

	# Of Insp.	# In Comp.	% In Comp.	# With Only Other	% With Only Other	# With Only SWR	% With Only SWR	# With SWR And Other	% With SWR And Other	% Insp. With SWR Violations
FY 1979	23,756	7497	31%	7874	33%	2456	10%	5929	25%	35%
COMPLAINTS										
FY 1979 Health and Safety	20,154	7875	39%	4756	24%	2203	11%	5320	26%	37%

Source: OSHA Policy Office

Table 4

INJURY/ILLNESS EXPERIENCE 1973 AND 1978

FOR INDUSTRIES MOST INSPECTED BY OSHA

SIC	Industry	# Inspections FY 1979	1973			1978			% Change in Total 1973 to 1978
			LWD[1/]	NLWD	Total	LWD	NLWD	Total	
1700	Const. Spec. Trade	11204	6.2	13.2	19.4	6.6	9.2	15.8	-19%
3400	Fabricated Metal	4139	6.4	16.3	22.7	8.0	11.3	19.3	-15%
1500	Bldg. Const. Gen. Con	3982	6.1	14.6	20.7	6.3	9.6	15.9	-13%
2000	Food & Kindred Pro	2968	6.8	8.8	19.2	8.9	10.5	19.4	+ 1%
3500	Mach. excl. Electr.	2749	4.3	13.4	17.7	5.4	9.0	14.4	-19%
1600	Const. Not Build.	2668	6.2	13.1	19.3	6.2	10.3	16.6	-14%
3300	Primary Metals	2321	6.3	14.5	20.8	7.5	9.5	17.0	-18%
3700	Transp. Equipment	2210	4.6	12.1	16.7	5.1	6.3	11.5	-31%
3600	Elect. & Elect. Mach.	1953	2.7	8.1	10.8	3.3	5.4	8.7	-20%
2800	Chemicals	1769	3.0	6.7	9.7	3.3	4.5	7.8	-20%
2400	Lumber and Wood	1603	9.2	14.8	24.1	11.1	11.5	22.6	- 6%
3000	Rubber & Misc. Plast	1589	6.5	11.3	17.8	8.1	9.0	17.1	- 4%
3200	Stone, Glass, Clay	1167	5.9	12.3	18.2	7.8	9.0	16.8	- 8%
	Private Sector Total		3.3	7.5	11.0	4.1	5.3	9.4	-15%

[1/] Rates are cases per 100

LWD = Lost workday injury/illness rate

NLWD = Non-lost workday injury/illness rate

SOURCES: BLS Occupational Injuries and Illnesses in the United States, by Industry, 1973
BLS Occupational Injires and Illnesses in 1978: Summary
Office of Management Data Systems

The CHAIRMAN. Thank you very much, Mr. Denison.

Let me say that we have heard many, many witnesses before us in the course of these hearings, and most witnesses agree that there is a need for the agency—mindful of its limited resources—to target its enforcement activities in the areas where they will do the most good.

We know that when OSHA's presence is felt in the workplace, there is generally improved attention to safety and health matters in that workplace. The data which you cite in your statement, that only about 30 percent of workplaces initially inspected by OSHA are in compliance, while 90 percent of the followup inspections result in compliance, indicate that an OSHA presence is very effective in inducing compliance with the law.

In view of this, it would seem to make sense that OSHA's inspections should be directed to those workplaces where the need is greatest.

I wonder, do you agree that OSHA's inspection activities should be focused in some way, and if so, how would you focus that OSHA inspection?

Mr. DENISON. Mr. Chairman, it is our belief that the best determinant of where the focus should come should be a dual one. Certainly, the agency should attempt to target its inspections on the basis of where they feel, obviously, there is a record of hazardous work. But we have learned by experience that probably the best determinant of what is an unsafe workplace are the workers themselves, and therefore—and I think the testimony bore this out—that where workers themselves identify and report and make complaints as to hazards on their job, both in safety and in health, the resulting inspections have shown to result in approximately the same number of citations as happens with inspections initiated by OSHA.

So generally, we have come to develop a respectful appreciation of the workers themselves being in the best position to know where dangers exist. That, I think, is our greatest fear and concern here today, that even under the present law, workers are finding that they are under great pressures when they make complaints. They are harassed, they are discharged in many instances. This bill would make that difficulty even greater and the threat to the worker even greater. So any threat hanging over him in terms of first of all, if he does complain, it will be referred immediately back to the employer, is a strong inhibition in itself and would, we believe, take away from encouraging inspections where the hazards are most great.

The CHAIRMAN. I wonder how you evaluate OSHA's current enforcement targeting—which is done by evaluating injury incidence rates of the various SIC's, the standard industrial classification. In your mind, does such a targeting mechanism present a very real possibility that high-hazard workplaces in the so-called low-hazard SIC's could very well be missed by the agency?

Mr. TAYLOR. Well, Mr. Chairman, there are inherent difficulties in developing an adequate targeting system under the present type of data that has been developed by OSHA and by BLS, by workers' compensation data. There are some good and some constructive data that can be found in all of those to a certain extent, if you recognize the lacks and the weaknesses of each one.

Now, as you know, OSHA's targeting system is based on 2 percent of the workplace, covering about 16 percent of the population in those SIC's which they have developed. The thrust of S. 2153 is toward establishing establishment data, rather than SIC data. And Senator Schweiker's bill is attempting to identify the establishment and the ranges of these establishments by which you can make some kind of a determination as to the degree of hazard on the basis of establishment as well as industrial sector data.

You cannot depend on BLS for establishment data, because it has guaranteed confidentiality to those 60,000 firms that are on its sample list, cannot be used on that basis because if they were, these businesses probably would get out of the system, and BLS would have no data to rely on in terms of an operable system, such as it is. So there have to be other methods. We do not have any magic formula for it, but I agree with Ray, and in our testimony, there is a statement from the Michigan OSHA Director that the most reliable—once it is developed—of determining a hazardous situation is the worker's complaint, it is intelligently and adequately presented.

The CHAIRMAN. Another observation that I would like from you gentlemen—and I see Mr. Gold has joined you, and we welcome you, Mr. Gold——

Mr. GOLD. Thank you, Mr. Chairman.

The CHAIRMAN [continuing]. In your formal statement you assert, in your discussion of referrals, that under S. 2153, OSHA could not conduct inspections in exempt workplaces as a result of health-to-safety referrals because such inspections would have to be general schedule inspections.

I am wondering why couldn't this kind of referral, health-to-safety, be treated as a complaint, much the same way that they are treated by the agency? If they were treated as complaints, then it would seem to me that they could result in inspections, even in the so-called exempt workplaces. Have you thought through this?

Mr. DENISON. Well, it is possible, but it would mean reconstituting the complaint, and most people's experience with bureaucracy, I am afraid, is that if it comes in as a safety complaint, it would be unlikely that it would be extended over into the entire health area——

The CHAIRMAN. Health to safety.

Mr. DENISON [continuing]. Right—or the other way around.

The CHAIRMAN. Because you see, there is no exemption at all on health inspections——

Mr. DENISON. I understand.

The CHAIRMAN. And in the health inspection, there can be the discovery of problems on the safety side.

Mr. DENISON. Right, but I would think that would require some initiative on the part of the person who is charged with that inspection, and I think our concern is that most people have a tendency to confine themselves strictly to the issue in front of them and do not think beyond the health issue that they have and then go into safety, and the likelihood could be in bureaucracy, as things are, that one could be rebuffed, saying, "This is a health inspection solely. I cannot get into that area. If you want to get into that area, you have to file a separate complaint and go through that procedure." I can just see that possibility arising.

Mr. **Taylor**. Senator, just one small addition to that, and it is gone into in the last paragraph of that section on page 10. That is, if an industrial hygienist goes into a plant on a health inspection—which is, of course, allowable under the same conditions provided by the Schweiker bill as now—and he finds a safety violation, one or more, there is no prohibition in Senator Schweiker's bill against making that referral. However, there might as well be because of the fact that that referral goes to a safety inspector, and if this is an exempted firm as far as general schedule inspections, under S. 2153, unless a death or hospitalization takes place, there cannot be any general schedule inspection, unless there is a complaint. That is the whole problem that you have here.

The **Chairman**. Senator Schweiker.

Senator **Schweiker**. I would like to ask Mr. Denison, in response to Senator Williams' question, you said you agreed with the idea of targeting hazardous workplaces, and I think in principle, we are in agreement with that, and I appreciate your answer. I think the difference comes about as to how you do it and what statistical data base, if any, you use to do that.

One of the areas of difference is the matter of complaint inspections. My bill picked up the General Accounting Office recommendation which recommended that they be screened in some way, that OSHA try to resolve many complaints without an inspection, but if OSHA determines that the problem has not been resolved, then the complaint inspection will go forward. Apparently, OSHA is now doing that with verbal inspections; it is not doing it with written inspections. And my bill did what GAO recommended, which was to make it the same for both verbal and written. I think this is where we have a difference.

I am very much concerned that our complaint inspections basically clog the system, because a lot of them are not productive. Now, some are, and I do not disagree with your point a minute ago, that somebody's vigilance at the workplace is a good measuring stick of whether there is safety at the plant. I do not argue that at all. I think that is a very valid observation.

My question is whether, in resolving these complaint inspections, it would in any way change the concern you have about my procedure if we were to have the person who filed the written complaint be a determining factor as to whether the situation is remedied. Now, under my proposal, OSHA makes that determination, whatever judgment OSHA wants to do after the employer does or does not do certain things.

My interpretation of that is that he has to have some bona fide proof, one way or the other, as to whether this is resolved. But if we were to spell it out so that the complaining party determines whether or not a problem has been remedied, would that make any difference in your concern about the right to a complaint inspection? In other words, if we said that if the complaining party still said, after whatever remedy was done by management, that the situation still exists, then to make sure that complaint inspection occurs, would that, Mr. Denison, change your perception of this particular section that troubles you folks?

Mr. DENISON. Are you still assuming under this situation, Senator, that the complaint that was made to OSHA is first referred to the employer, and you are assuming here that satisfactory adjustment has been made in the eyes of the employer, but if the employee does not feel that is the case, then you are saying he can pursue it further? Is that what you are saying at this point?

Senator SCHWEIKER. I think that is my assumption. Let me just fill in there that the assumption would be that where there is a difference of opinion between the employer saying, "Well, it has been resolved," and the person who filed the complaint saying, "No, it has not been resolved," that that then would trigger an inspection which would occur just a bit different than it might now. But one advantage I see in that is it does knock out the frivolous inspections. It also does what I think one of your concerns has been—and we differ on the application of this particular technique—where the person who is on the receiving end of it, the firing line, sees that in fact, nothing has changed, and the employer is not telling the truth, would have the right to get an inspection after that step.

Mr. TAYLOR. Senator, I gather that your question would be that if a worker who has filed a complaint is not satisfied with the progress in abatement after assurances have been made by the employer, that the worker might have some additional procedural rights to pursue that with OSHA. Is that the thrust of your question—should something be worked out in the approach—an abridgement or a modification of the approach in your bill would provide for that additional procedural protection for the worker? Is that what you are——

Senator SCHWEIKER. Maybe I had better repeat it. I think that is it, but let me repeat it. In other words, one of the differences we have on the bill is that I feel that giving OSHA the right to determine whether something has been resolved, based on what the employer says or does not say in a situation, you take issue on the basis that the employer may not represent it accurately, they may do something tentatively and then switch it back again. I am saying that this was not my intent. I am asking if it makes any difference if we would change that particular section so that the complaining party would make a judgment as to whether management did, in fact, rectify the problem. And if the employee who complained still does not feel that the situation is satisfactorily resolved, he still feels there is a hazard there, then it triggers automatically the complaint inspection procedure that you folks have been concerned about.

Mr. TAYLOR. Well, there are certain changes in relationship between the worker, the employer, and OSHA, as you go through the complaint process. Generally speaking, I think it is true that a worker will attempt to exhaust his remedies in the plant, because it is a very serious thing to file a complaint with OSHA. It, in many cases, can result in some discriminatory action by the employer if he finds out who does it. So when a complaint is filed, it is usually seriously filed, and then it becomes a one-on-one relationship between the complainant and the OSHA inspector of the area office who responds to that complaint.

Management is drawn into it only after the inspection is made in response to that complaint. What your bill would have would be a continuation of the relationship between the worker, the management, and OSHA, just as though it was back at the plant level.

Now, it seems to me that it ought to stand just the way it is now in the act. You may recall when President Kirkland was before this committee, and the same type of question was asked, "What do you do with the complaint which is not really on target in terms of eliciting a response that has a serious or some other type of violation that comes out of it?" I think his answer was something that you do not want to get—well, it is a good answer, because you use commonsense in determining the wheat from the chaff. And if you imprison that kind of a procedure in a statute, and you do not use commonsense in administering statute, then you have got this act forced by law into operating that way. That is the reason why we say, and one of the reasons why we oppose your bill, is because it does freeze a given procedure into a statute, and once it is in there, it is very hard to get out if it turns out that it needs to be modified. That is the reason why I say a one-on-one relationship with the worker complaining, after he has exhausted his possibilities with management in the workplace to clean it up, is a whole lot better than the device that you have there, in your bill.

Senator **Schweiker**. I am not sure I fully understand your answer. Would this alleviate some of the concern you have about the complaint procedure as you interpret it in my bill?

Mr. **Denison**. I do not think so, Senator. I think it adds another step in the whole procedure, but it is the procedure itself that, as George says, is highly structured. The employer must be notified immediately that the inspector is not going to come out on the basis of this complaint, as the worker had hoped when he made the complaint. Instead, the next response he is going to get is from his foreman, saying, "I understand you filed a complaint with OSHA? What the hell is going on here?" And he feels betrayed at that point. He thought he was appealing to an agency of the Government to come in and help him, and instead he now finds an employer on his back——

Senator **Schweiker**. Well, how does that work now? I mean, they still——

Mr. **Denison**. But he has lost the surprise element in this instance, when the employer is notified prior. Otherwise, he was assuming the inspector would come out, find this terrible situation, unbeknownst to the employer, and machinery would be in motion to correct it.

Senator Schweiker. But won't they give a lot more credence to that employee's feelings in terms of what he feels is a safe workplace, because they know that if it is not rectified, he has the power to get an inspector out.

Mr. **Denison**. I would assume under present law, if he is not satisfied with what happens, he files another complaint.

Senator **Schweiker**. But you said it is not known. You were telling me a moment ago that that is not known; that there is the surprise—that they do not know about it, so the point is that he cannot exercise clout if they do not know.

My point is that now, he has the clout to say, "Get it straightened out, or we will have an inspector here."

Mr. DENISON. But as I say, he has lost the element of surprise.

Senator SCHWEIKER. He has some clout that he did not have before because you said it is unknown.

Mr. DENISON. But he has lost the element of surprise, and the assumption is under present law, as apart from what you were suggesting, he could simply initiate a new complaint.

Senator SCHWEIKER. Well, he lost the element of surprise, but on the other hand, he picked up the element of enforcement, because he has the threat of an inspector coming in and seeing the situation after they in fact said it has been corrected. So he has a lever that he did not have before.

Mr. DENISON. I think you are suggesting, as George implied in his response, that these are all equals, that the worker is going to stand determined, that he is going to resist the attempts by the employer to gloss over and not fully comply. Intimidation comes into this very early on, and the length of time in which the employee will sustain his complaint may not go much beyond the moment in which he is so outraged that he filed the complaint initially; and as he made it over the phone or in writing, he may even begin to have second thoughts at that moment, particularly in a nonunion establishment.

Mr. TAYLOR. Could I add just a short bit to that?

Senator SCHWEIKER. Wait, I am not clear on that point, Ray, because in most cases—I think one of you just mentioned a moment ago—they try to resolve it before it goes to OSHA, anyway.

Mr. DENISON. I am talking about a union——

Senator SCHWEIKER. So the surprise, No. 1, is not there, and No. 2, he already has stuck his neck out with management.

Mr. DENISON. But there is a big difference between going to your foreman and saying, "Hey, we have a problem over here. Let us see if we cannot work it out," and taking that very big step of filing a complaint with a Government agency. That is a far different thing, and once he has done that, to then be embroiled in a situation where——

Senator SCHWEIKER. But every witness up until now has said that it was that threat of filing a complaint that gave the employee clout, it gave him something—a club so to speak——

Mr. DENISON. Well, that is true. It depends on the establishment.

Senator SCHWEIKER. And now you are saying it does not; I do not follow that.

Mr. DENISON. Well, no, I am not saying that. I think it depends on the establishment, it depends on the union, the amount of clout the worker feels he has. But anyone who has ever worked in a shop, where he feels all alone, and particularly in the economic climate we have right now, he is going to be less inclined than ever to do anything that would bring any kind of disfavor down upon him by his foreman.

But certainly, if it is a bad situation, and he does try to work it out, and there is the threat there, there is a difference between the threat being there and actually doing it and getting the response in a surprise situation; it is something else to file it, and then the employer hearing about it and quickly making some redress, if he ever does, that would somewhat pacify the worker and somewhat satisfy the OSHA inspector. It is a very difficult area for an individual to follow through. And then you are suggesting, at the end of this chain, that he then has the right, because he feels both the employer and, he is afraid, OSHA have failed him, he can come back again. I doubt if he would——

Senator **Schweiker**. One of the problems that I have heard in this area is that in many of these high-hazard areas, and particularly in construction, is if they file a complaint now, they cannot get an inspector for some time, and just the fact that we are clogged in the system in whatever targeting we have, and the fact that we only inspect about 2 percent of the workplaces, right now, the system is bogged down, and you cannot get the inspector right away, anyway. And I have heard from a number of people who have written me in response to my bill and say, "Well, our biggest problem is we cannot get an inspector when we want an inspector."

So it would just seem to me that if we have the double opportunity to correct it first, and if it is not corrected, guarantee the right to inspection, you combine the elements of what you are saying—you want the right to have an inspection no matter what—and also, you give the minor, superficial, frivolous things a chance to work out. Don't you think it would be that way?

Mr. **Denison**. Well, the obvious answer, of course, is more inspectors.

Senator **Schweiker**. Well, I do not disagree with that.

Mr. **Taylor**. Well, there is another thing to consider. The nature of the workplace at a construction job is somewhat different from a fixed-site factory or production line, where an operation might last 2 or 3 days and pass on to another phase of construction.

The ordinary response of OSHA inspection compliance officers has been pretty good—within a week, 10 days, sometimes longer—in terms of the available of enforcement manpower in responding to complaints, and also in terms of the fact that complaints are increasing.

But in situations on construction jobs, you may have an entirely new phase of construction by the time a week goes by and an inspector gets out there. Construction unions, therefore, are taking other means than the complaint, although they use that in some large construction enterprises, and that is, to walk off the job. That is the quickest, best way of doing it. Under the *Whirlpool* decision, there is going to be more of that.

Senator **Schweiker**. One of the other areas that we have discussed at these hearings, of course, is litigation, increasing litigation. And you mention in your statement this morning that fiscal year 1973, only 4 percent of the violations cited by OSHA were contested before OSHA. By fiscal year 1979, 21 percent of the citations are now contested. And this is a 480-percent increase.

The question is, Why are there more contested citations, and what does that mean? You imply, and some others have, too, that increased litigation is a result of management deciding to dig in and fight. Some employer witnesses have testified that in fact, it is because of, No. 1, polarization that exists in the way that OSHA is enforced, and No. 2, the unrealistic way that OSHA enforces the law.

I asked the Occupational Safety and Health Review Commission for a breakdown of what is happening on these increased citation litigation procedures, and it is interesting because for the calendar year 1979, which is when there were 518 contests going through the procedure, here is the breakdown: On 24 percent of the cases that were contested, OSHA was affirmed totally; on 22 percent, OSHA was completely reversed; on 4.8 percent, the penalty was reduced to zero, with no penalty from the citation; and 48 percent, the penalty was reduced, and/or some of the citations were dismissed.

Now, that does not show a pattern of willful, contested, frivolous litigation. It shows that 24 percent, OSHA was upheld; 22 percent, OSHA was reversed, and 5 percent, the penalty was knocked out, and another 48 percent, the penalties and/or the citations were reduced. So contrary to the impression that there is a lot of frivolous litigation going on here, in fact, OSHA has only been upheld 24 percent of the time, which I think tells us something about the problems we have.

Mr. Denison. But on the contrary, Senator, it says that OSHA was correct 75 percent of the time. They say there was obviously an infraction because there was a penalty. The question was that the penalty was being reduced.

Senator Schweiker. The penalties and citations were either reduced or knocked down to zero in 52 percent of the cases. Now, that is not really being upheld.

Mr. Denison. The penalty, in any case, I think, indicates that there was a valid complaint in that case that was being challenged but was reduced in penalty but not dismissed. If you had said 75 percent were dismissed, that would be something else.

Mr. Gold. If I could, I would add that given the normal range of penalties under this statute, it is highly unlikely that the amount of the reduction achieved by a review commission modification of the penalty is a quarter of the amount of the employer's litigation costs. When you have that kind of expenditure for that kind of a result, I think it tends to support our inference of a desire for delay and a desire to engage in litigation for its own sake, rather than a justified feeling by employers that they are being improperly cited. What you have is, at the most, one case out of four in which the employer, at the end, can say he has shown that he was improperly cited.

Senator Schweiker. Well, first of all, the figure of 48 percent included partial vacation of allegations, so in addition to reducing penalties, that figure also included cases where they actually vacate the allegations or citations to some degree. And second, if you compare these figures to the previous history of the OSHA citation litigation, there is really not much change. So again, the only thing that is happening is that more and more are being contested, but the outcome is roughly the same. The allegations that are affirmed by OSHA over the whole period were 25 percent; the allegations that were reversed by OSHA were 24 percent; 6

percent were reduced to zero; 44 percent, the penalty reduced, or partial vacation of allegation.

So in essence, with one or two percentage points, there has not been any significant change in the percent that OSHA is winning, the percent that management is winning, or the percentage of cases that basically have been modified or reduced or vacated.

Mr. DENISON. What it says is that the employer facing continued odds of losing, three to one, continues to litigate, and that suggests that he is buying time, or buying harassment, or something else, even though the odds are overwhelmingly likely that he is going to lose in some degree.

Senator SCHWEIKER. Well, if the ruling of the judges and Commission only upholds OSHA in one out of four times, you cannot exactly blame them. So it shows to me the system is not working right; that is the point I am trying to make.

Mr. TAYLOR. Senator, what actually happens is you get an average penalty, contested or otherwise, of about $350 per serious violation. As Mr. Gold pointed out, you pay more for writing a letter to a firm of lawyers to contest than you do for that fine.

The second thing is that as long as that case is before the Review Commission or it is in the courts being litigated beyond that, that company does not have to do one thing to abate the violation for which it was cited. Now, that is buying time. This whole process is buying time.

Senator SCHWEIKER. Well, I agree. And that is exactly one of the reasons for my bill, was to give both the carrot and the stick technique, so that we did not get into litigation, so that we have a more positive and constructive climate, instead of just increasing litigation nearly 500 percent. I think it shows that the system is polarized, the very thing we see here. And that is what I think is unfortunate for the poor guy on the firing line, as long as you get the litigation, because the procedure is not the best; I think that tells us something is wrong with the law.

The CHAIRMAN. I wonder, could I go to counsel, Mr. Gold, and seek his opinion on a couple of bills that we have not mentioned? We have bills introduced by Senators Thurmond and Bumpers that deal with the attorneys' fees. These bills would reimburse litigation costs of an employer who is successful in these contests with OSHA on citations and proposed penalties.

What do you think of that, Mr. Gold?

Mr. GOLD. Those bills are a variation of broader proposals pending before the Judiciary Committee, which would establish the principle that an individual or a company, that defends against a Government suit and prevails ought to recover attorneys' fees.

Our view on that is this approach is unwise. The rule in this country—and it is called the American rule—is that each side bears its own attorneys' fees except in extraordinary situations. The English rule provides the prevailing party with attorneys' fees as a matter of course. Litigation is not an ideal, but the experience is that the English rule puts enormous disincentives on bringing even rational, soundly based cases. In theory one ought to be able to predict whether you are going to win or lose a lawsuit, but you know and I know that the ability to do so is considerably less than it should be because of the fact that one judge is not going to be precisely the same in his views as another, precedents are not invariably followed, one panel of a court of appeals tends to look at things differently from another, and so forth. There is an indeterminant factor in all litigation. And if the penalty of being wrong is to pay your opponent's litigation costs, that places a very substantial barrier in the way of bringing even sound, rational, good faith cases. The disincentive is greater for people who have limited resources than for those who can afford the added cost of being wrong. And given the very limited sums that are available to OSHA, to put this added burden on the agency would chill enforcement and be unwise. As far as I am concerned any system other than payment of attorneys' fees for situations in which you can prove bad faith would be unsound, and even that limited approach is questionable.

The CHAIRMAN. I appreciate that very thoughtful response to the question. It is very helpful. Thank you.

Mr. DENISON. Mr. Chairman, could we put into the record the addendum showing the fatalities on a State-by-State breakdown, as if S. 2153 were in effect?

The CHAIRMAN. This goes to the Workmen's Compensation question.

Mr. DENISON. We would have made it an attachment, but we did not get it until too late.

The CHAIRMAN. It will be included. Thank you. And we thank this panel.

Mr. DENISON. Thank you.

[The following was received for the record:]

THE FALLACY OF THE 'SAFE' WORKPLACE

As a test of the so-called 'safe' workplace, the AFL-CIO obtained computerized printouts which listed by name and by employer all workers whose deaths were reported to OSHA as on-the-job accidents in 1978, together with data concerning previous safety records.

This data provides an illuminating illustration of why the criteria and exemptions under S. 2153 are a delusion.

The computer printouts were analyzed on just one basis: Would the workplace where one or more worker was killed have been exempted under the criteria of S. 2153?

This is what the data revealed: Out of 1,203 worker deaths for which complete data were available, 489, or 41% of the total, occurred in workplaces which would have been exempted from general schedule inspections under S. 2153.

A graphic example is the terrible tragedy which snuffed out the lives of 47 workers on an electric utility cooling tower at Willow Island, West Virginia. Under S. 2153, the prime contractor would have qualified for an exemption and would have been adjudged a "safe" workplace and not subject to general schedule inspections.

The attached data shows the state-by-state breakdown of on-the-job fatalities in 1978 where the workplace would have been exempt under the provisions of S. 2153.

ALABAMA WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
J T Schrimsher Const. Huntsville, AL	Adam Majlik
Manhattan Walton Joint Venture Lineville, AL	Gary Beam
Bogan Plumbing Co. Pinson, AL	Joseph Morrow
McDowell Contractors Graysville, AL	Charles Williams
Avondale Mills Sylacauga, AL	James Thorton
Beavnit Corp. Childersburg, AL	Albert Conwill
International Paper Co. Monroeville, AL	Argin McKinley
Neil Bush Lumber Co. Clayton, AL	Tom A. Hamilton
Georgia Pacific Corp. Monroeville, AL	Morris Finn
The Kingsford Co. Dothan, AL	Jim McLin
Scot Paper Company Mobile, AL	Aubie O. Holder
Graham Paper-Div. of Jim Walter Birmingham, AL	Hilary A. McDonald
Stauffer Chemical Company Cold Bucks, AL	Joe M. King
Rodriguez Boat Builders Inc. Coden, AL	James Hancock
Dothan Optical Lab Dothan, AL	Thomas W. Bell
Alabama Power-Logan Martin Dam Vincent, AL	Douglas Flemming

Company	Worker
Southern Natural Gas Birmingham, AL	Clyde M. Letson
Mayo Tire Distributors Inc. Pinson, AL	John Trimble
Dallas Webing Machine & Met. Selma, AL	Gus Rose

In Alabama, OSHA fatality data shows 38% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

ARKANSAS WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Corner Stone Farm & Gin Co. Pine Bluff, AR	Leomer McFadden
Lee Wilson Construction Co. Wilson, AR	Chester Patterson
Delta Asphalt of Arkansas Inc. Paragould, AR	Joe Cable
Power Division Brown & Root, In. Redfield, AR	William E. Black
Valmac Industries Inc. Pine Blu Pine Bluff, AR	Willie Taylor
Monticello Carpet Mill-Div. of Monticellok AR	Tony A. Suber
International Paper Co., Inc. Pine Bluff, AR	Fred Tisdale Raymond King
Great Plains Bag Corp. Jacksonville, AR	Troy Hall
McClinton-Anchor Co. Johnson, AR	James Hittson
Plastronic Packaging Corp. Ozark, AR	Kenneth Bowman
Arkansas Best Freight Systems Little Rock, AR	Henry Sims

In Arkansas, available OSHA fatality data shows 50% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

COLORADO WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Tesak Construction Inc. Pagosa Springs, CO	Clinton Clarke
Nichols Electric Service Co. Durango, CO	Robert Burton
Brewer's Waterproofing Denver, CO	Guadlupe Rodriguez
Research-Lottrell Fabricators Brighton, CO	Robert G. Six
Titan Sand and Gravel Littleton, CO	Harold Hawkins
Universal Studios Phipps Ranch, CO	Richard Kelton

In Colorado, available OSHA fatality data shows 40% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

CONNECTICUT WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Bristol Steel Erectors Newtown, CT	Gaston Blanchard
Alpha Crane Service East Hartford, CT	Stephan Palmeri
United Concrete Products Hartford, CT	Stephen Heath
Devine Bros. Inc. Norwalk, CT	Robert Spotto
Scovill Manufacturing Co. Watertown, CT	Edwin Keith
Sanitary Refuse Co. of Manchester Manchester, CT	Robert Jackson
United Illuminating Co. Fairfield, CT	Joseph Ellis
White Pine Corp. Site Winsted, CT	Frank Shirretto
Wallingford Radiator Service Wallingford, CT	Michael Pascale

In Connecticut, available OSHA fatality data shows 60% of workers deaths occurred in S. 2153 "safe" workplaces in 1978.

DELAWARE WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
John Healy and Sons Wilmington	Francis Greene

In Delaware, available OSHA fatality data shows 20% workers' deaths occurred in S. 2153 "safe" workplaces, in 1978.

FLORIDA WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Royal Palm Cultivation, Inc. Loxahatcher, Florida	Abie Robinson
Cocoa Cola Co. - Food Division Apopha, Florida	George W. Bridges
Ruskin Tomato Grower, Inc. Ruskin, Florida	William Cofer
John Miller, Jr. Labor Contractor Zellwood, Florida	John Larry Owens Ronald K. Brown
Pollard Fruit Company Lake Wales, Florida	Herman Cantrell
Slim Jim's Tree Service Tampa, Florida	Ralph L. Gay
HKH Family Properties Ft. Launderdale, Florida	James Bachner
Garcia Allen Construction Co. Miami, Florida	Oscar Perez
H.P. Barton Dredging Co. Hastings, Florida	Marvin C. Brooks
B.F. Diamond Construction Co. In. Deslin, Glorida	J.D. Browing
Burnup & Sims, Inc. Titusville, Florida	Jose Devega
Henkles & McCoy, Inc. Brooksville, Florida	Elmer Ray Bishop
Bryant Electric Company North Miami Beach, Florida	James O. Troutman
Robert J. Ackerman, Inc. South Bay, Florida	David Roy Walters
Hawker Enterprises, Inc. Lauderhill, Florida	Daniel Wilson
Structural Methods, Inc. Pompano Beach, Florida	John Dave Marlow
New Wales Chemicals, Inc. Mulberry, Florida	B.H. Blanton
Dade Division American Hospital Miami, Florida	Alfredo Espinosa

Florida page 2

Company	Worker
Eastern Airlines, Inc. Miami, Florida	Robert D. Hubbard
Florida Power & Light, Putnam East Palatka, Florida	C.E. Remusat
Florida Power Corporation St. Petersburg, Florida	Robert R. Stokes
Pinellas Lindsley Lumber Co. In. St. Petersburg Beach, Florida	Robert Keller

In Florida, available OSHA fatality data shows 41% of workers' deaths occurred in S. 2153 "safe" workplaces, in 1978.

GEORGIA WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Milton J. Wood Co. Riceboro, Georia	Herman Bragg
Cives Construction Co., Inc. Cons. Port Wentworth, Georgia	Robert C. Turner
Cleveland Consolidated Inc. Coosa, Georgia	Lynn T. Pate
Riverside Glass Co., Inc. Augusta, Georgia,	Robert Cook
O'Neill Brothers, Inc. Atlanta, Georgia	Leo Hunt
Dundee Mills Griffin, Georgia	Jimmy Harris
Rayonier Inc. Jesup Division Jesup, Georgia	Arlin A. Jackson
Hercules Incorporated Oxford, Georgia	Danny K. Cordell
USS Agri-Chemicals Division Albany, Georgia	R.T. Bellmon
United States Steel Products Newnan, Georgia	Theodore Parks
Elynn Concrete Co. Brunswick, Georgia	Benford Grant, Jr.
Babcock & Wilcox Co. Brunswick, Georgia	Joseph L. Brauda
Delta Air Lines Inc. Atlanta, Georgia	Bruce K. Tilly
Georgia Power Co. Tucker, Georgia	Judson C. Cleveland

In Georgia, available OSHA fatality data shows 38% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

IDAHO WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Peter Kiewit Sons Co. Clarkia, ID	William Beechy
Larry Donohoe Logging Cover D'Alene, ID	Carroll Grahm
Fowler Logging Inc. Ashton, ID	Jesus Soto
Utah Power and Light Rexburg, ID	Lewis Bateman

In Idaho, available OSHA fatality data shows 25% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

ILLINOIS WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Landco IVA Limited Partner Watson, IL	Charles D. Scheal
R D Lawrence Construction Co. Springfield, IL	Henry Buchtman
Crane Construction Co., Inc. Chicago, IL	Edward McNall
Ferro P T Construction Co. Joliet, IL	Hugh J. Hanlon
Allied Contracting Co. of Springfield, IL	James C. Smith
Phillips Getschow Co. Cordova, IL	James E. Droke
Mennotti Plumbing Inc. Chicago, IL	Allen Primus
V. Jobst & Sons, Inc. Mapleton, IL	Clifford M. Jasper
Belding Corp. Mossville, IL	Martin J. Volk
Synthetic Pillows Inc. Chicago, IL	Moises Gonzales
Bruce Quality Pallets Batavia, IL	James Weilend Mike Miscesich
Ashland Chemical Co. Calumet City, IL	Teathel Maupin
Scholle Corp. Northlake, IL	Melvin Jones
Daubert Chemical Co. Chicago, IL	Ragner Anderson Gary Murphy
Shell Oil Co. Wood River, IL	George Bednar
Thelen Ready - Mix Inc. Antioch, IL	Harold Freund

Company	Worker
International Mill Service Inc. Granite City, IL	Sume Cooley
Interstate Smelting & Refining Chicago, IL	Mose Hollins
Olin Corp. Brass Div. E. Alton, IL	Hobart Cook
U. S. Steel Corp. Waukegan, IL	Benedict W. Grass
Whiting Corp. Harvey, IL	Sergio Romo
General Electric Co. Chicago, IL	Fred Parker
Coonrod Wrecker & Crane Service Peoria, IL	Keith Coonrod
W L Waggoner Trucking Co. Madison, IL	Harry Whitson
Ottowa Cartage Inc. Ottowa, IL	Gregory Jackson
Central Ill. Light Co. E. Peoria, IL	Anthony Samsa, Jr.
Ill. Power Co. Belleville, IL	Sidney M. Stevenson
M & M Equipment Inc. Albers, IL	Robert Zurliene
Don Jackson Oil Co. Princeville, IL	Don Jackson
Marathon Oil Co. Arlington Hgts, IL	Lenard Mancolas John Willard
First Calumet City Savings Calumet City, IL	Henry Fred Herie
UIDC Mgmt. Inc. Chicago, IL	Paul Poremski
Chas Levy Circulating Co. Inc. Chicago, IL	Genski Clarence

Company	Worker
Funway Inc. Batavia, IL	Ed Garhardt
A & H Engineering Co. E. Peoria, IL	Alan W. Yaeger

In Illinois, available OSHA fatality data shows 42% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

KANSAS WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
RAO Construction Co. Prairie Village, KS	Marion Carr
L. A. Knebler Construction Company, Inc. Derby, KS	Paul J. Trayer
Pearson Excavating Inc. Wichita, KS	Terry Dale Pearson
Clearwater Excavating Inc. Goddard, KS	Stephen W. Gorges
M. W. Watson Inc. Topeka, KS	Dennis R. Balagna
Mid-Central Constructors Colony, KS	Rex E. McCullough
Pike Construction Co. Winfield, KS	Gary L. Zimmerman
Graber's Plumbing & Heating Newton, KS	Richard Graber
C. & L. Roofing Co. Kansas City, KS	Melvin Bowber
Kansas City Structural Steel Kansas City, KS	Marvin Hollingsworth
Grain Products Inc. Dodge City, KS	Donald H. Schultz
Sisco, Inc. Goddard, KS	Stephen W. Gorges

In Kansas, available OSHA fatality data shows 43% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

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LOUISIANA WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Poplar Grove Planting & Refining Port Allen, LA	Marion Himel
Asplundh Tree Expert Co. Norwood, LA	Robbert Anthony
The Superior Oil Co. Patterson	Ronald A. Perry
Bariod Division - National Lead Bossier City	Sammie E. Ford
Teledyne Movible Offshore Inc. Lafayette	Jerry R. Higgins
Gulf Coast Drilling & Exploration Paradis	Benny Boudreaux
Safety Automation Co. Lafayette	Sidney A. Curley
Bariod Petroleum Services Cameron	George E. Lebouef
Alpha Construction Co. Inc. Shreveport	Charles Jackson
Power Division 3540-19 Brown Westwege	Dennis E. Blaum
American Bridge Division - U.S. Steel Killona	Donald W. McIntyre
Louisiana Industrial Coating I Westwego	James Hesler
Star Corrision & Refractory Donaldsonville	Nolan Tullier
Voorhees Rig Co. Amelia	Larn C. Anglin
Payne & Teller of Louisiana Baton Rouge	J.E. Wigington
Browning-Ferris Industries Norco	Clarence Greenup
Riviana Foods Inc. Abbeville	Alex Mathews

La. - Page 2

Company	Worker
Bodcaw Co. Boyce	Frank A. Lodridge
Willamette Industries Inc. Winnfield	Jimmy Ray Pruitt
BASF Wyandotte Geismar	John Courtney
Louisiana Industries Kenner	Aurther M. Daniels
Avondale Shipyards Inc. Amelia	Frederick R. Dupas
Union Mechling Corp. River Ridge	Malcolm George
SHJ Inc. Plaquemine	Kirt Jackson
The Bovaird Supply Co. Harvey	George G. Viallon
Marsh Buggies Inc. Marrero	Joseph E. Calvada

In Louisiana, available OSHA fatality data shows 36% of workers' deaths occurred in S. 2153 "safe" workplaces, in 1978.

MAINE WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Cives Construction Co. Jay, ME	Paul Latno
Great Northern Paper Millinocket, ME	Michael Lantagre
Tibbetts Industry Camden, ME	Ralph Drinkwater

In Maine, available OSHA fatality data shows 23% of workers' deaths occured in S. 2153 "safe" workplaces, in 1978.

MASSACHUSETTS WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Turner Construction Co. Boston, MA	Francis Shine
The General Tire & Rubber Comp. Lawrence, MA	Joseph McNamara
Stanwood Drapery Company, Inc. Boston, MA	Rene Louis
Foster Masonry Products Inc. Pittsfiled, MA	John Cahill
Harvard University Cambridge, MA	Francis Yebba

In Massachusetts, available OSHA fatality data shows 26% of workers' deaths occured in S. 2153 "safe" workplaces in 1978.

MISSISSIPPI WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Placid Oil Company Vossberg, MS	Edward Burl White
Southern Industries Builders Greenville, MS	Abe Woods, Jr.
Koppers Co. Tie Plant, MS	William Beck
International Paper Co. Moss Point, MS	John Simmons
Interior Packaging Co. Pearl, MS	Charles Huckabe
Dale Polk & Son Natchez, MS	Tommy Thornton
Dunn Paper Wiggins, MS	Glosten Flurry
State Neon Co. Pascagoula, MS	Dennis Lopez
Federal Compress & Warehouse Cleveland, MS	A. C. Sandifer
Mississippi Power & Light Jackson, MS	Charles Yeager

In Mississippi, available OSHA fatality data shows 38% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

MISSOURI WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Charter Development Company Eureka, MO	Donald H. Meiser
Allen Roofing & Siding Company Jackson, MO	Julius A. Talbert
Potashnick Construction Company Florissant, MO	James Calloway
Daniels International Inc. Fulton, MO	Marvin Ray Baker
Big Boy Steel Erectors St. Clair, MO	James Peebles
Vicon Corporation Cannon Dam Center, MO	Robert L. Estes
Crown Zellerbach Gaylord Conta. St. Louis, MO	Samuel W. Phillips
Vonder Hear Concrete Company Maryland Hts., MO	Ronald T. McGowne
Armco Steel Corporation Kansas City, MO	Michael W. Scott
Summit Structural Steel, Inc. Lees Summit, MO	Jerry Dean Winn
General Motors Assembly Division St. Louis, MO	Hurley Clarkson
Jasper Farmers Exchange Inc. Jasper, MO	James R. Bland
B&D Salvage Company St. Peters, MO	Stanley E. Crowe
R.A. Long DBA Fine Arts Sign Company Kansas City, MO	Leroy Fizer
White Advertising International Kansas City, MO	William L. Rouch

In Missouri, available OSHA fatality data shows 31% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

NEBRASKA WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Lemmerman Farms Inc. Palmer, NE	Arlan Peetz
Z & S Construction Co. Harrisburg, NE	Delvea Exum
Higer Construction Co. Superior, NE	John Launchbaugh
Allied Mills Cozad, NE	Edwin Jobman
Allied Chemical Corp. Bellevue, NE	Robert Campbell
Holdrege Cooperative Equity Elm Creek, NE	Stephen Bowie
Chicago Lumber Co. Grand Island, NE	Walter Schmidt
Lutheran Medical Center Omaha, NE	Mildred Duke

In Nebraska, available OSHA fatality data shows 73% of workers' deaths occurred in "safe" workplaces in 1978.

NEW HAMPSHIRE WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Frank Whitcomb Construction Walpole, NH	Arthur Buffun
Concrete Systems Inc.	Michael Curra

In New Hampshire, available OSHA fatality data shows 40% workers' deaths occured in S. 2153 "safe" workplaces, in 1978.

NEW JERSEY WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Liberty-Westcon Salem, NJ	Lloyd Lyons, Sr.
Al Czerwinski Long Beach, NJ	John Mathis
B J Builders of New Jersey Newark, NJ	Robert Taylor
Aruid Myhre Building Const. Vernon, NJ	William Stubender
P & A Construction Keansburg, NJ	Manuel Pereira
Environmental Systems Lyndhurst, NJ	Thomas McKenna
Gem Steel Erectors Linden, NJ	Ernest Ricse
Westside Erectors & Engineers Skillman, NJ	Morris Ostopuck
Tenneco Chemicals Inc. Fords, NJ	Howard Fraser
E I DuPont Deepwater, NJ	John Scarfo
E I DuPont Deepwater, NJ	Hugh Rafferty
E I DuPont Carney's Point, NJ	Thomas Rogers Winfield Lodge
Interpace Corp. Flagtown, NJ	Robert Jannozzi
Hunterdon Concrete Flemington, NJ	Craig Runyon
Ideal Aluminum Products Bayonne, NJ	John O'Neil

Company	Worker
Pilot Metal Fabricator Hawthorne, NJ	Ramon Quinone
Westinghouse Elevator Co. Jersey City, NJ	Thomas Murray
Waste Technology Enterprise Lakewood, NJ	Willie Tripp
PSE & G Belle Mead, NJ	Robert Mayer
Advance Industrial Security Union Beach, NJ	James Brandigon
St. Joseph High School Metuchen, NJ	William Reuther

In New Jersey, available OSHA fatality data shows 44 % of workers' deaths occurred in S. 2153 "safe" workplaces.

NEW YORK WORKERS KILLED IN S.2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Cohn Farms Sodus, NY	General Perry
Leland Durkee Carpenters Avon, NY	Paul Buckman
Union Concrete Construction Clymer, NY	William Andrews
Fiesa Asphalt Paving New York, NY	Giuseppe Mirabile
Higgins Erectors & Haulers Rochester, NY	Darcy Fournier
L W Casseut Clymer, NY	Jamme Beck
S J Groves & Sons Avon, NY	Edwin Lowe
Broome Industrial Painting Canaan, NY	James McMasters
G & S Electric Co. New York, NY	Gerard Raffelo
H Klein & Sons Garden City, NY	John Gampel
Modern Sheet Metal Supply New York, NY	Joe Robinson
Northern Demolition Inc. Hudson, NY	Frederic Cutler William Gallo Jerome Marien
Miller Brewing Co. Fulton, NY	William Harrington
General Electric Co. Waterford, NY	Susan Albertsen
Roth Brothers Smelting Corp. E. Syracuse, NY	Richard Nichols
Hamilton Tank & Metal Works New York, NY	Patrick Fullerton

Company	Worker
General Electric Co. Hudson Falls, NY	Nicholas Summo
Chevrolet Motor Division Buffalo, NY	Wilson Allhouse
Taylor Instrument Co. Henrietta, NY	Robert J. Malezk
New York Telephone Co. New York, NY	Joseph Deprocida
Niagra Mohawk Power Co. Hoosick, NY	Charles Dooley
Consolidated Edison New York, NY	Gerald Gibbons
Waldorf-Astoria Corp. New York, NY	George Kalabash
Buffalo General Hospital Buffalo, NY	Donald Ducato
Gruy Management Service Auburn, NY	Jeffery Fields

In New York, available OSHA fatality data shows 38% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

OHIO WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

1

Company	Worker
Rib Construction Corp. Steubenville, OH	Charles Strelch
Southern Ohio Building System Dayton, OH	Douglas Wooley
Bank Building Corp. Columbus, OH	Louis Ceckitti
Herman Brothers Inc. Holland, OH	Donald Ehrmin
John R. Jurgensen Co. Batavia, OH	Thomas Workman
W G Lockhart Construction Stow, OH	James Perry
W G Lockhart Construction Stow, OH	Michael Hayes
Mashuda Corp. St. Clairsville, OH	Lawrence Eourley
Oberle-Jordre Co. New Richmond, OH	Charles Workman
Shiloh Tank and Erection Co. Toledo, OH	John Whybark
Canton Erectors Inc. Canton, OH	David Nedrow
Esther Price Candies Dayton, OH	Maurice Bate
Galehouse Lumber Co. Doylestown, OH	Karl Reither
Albert Kenker Box Co. Cincinnati, OH	Anthony Carnavca
Westvaco Corp. Cleveland, OH	Joseph Sebek
Monsanto Company Port Plastics Addyston, OH	Lloyd Rowlette

Company	Worker
B F Goodrich Co. Avon Lake, OH	Craig O'Brien
Austin Power Co. McCarthur, OH	Roger Eruin Russel Jarvis Ray McVey
Hartville Block & Supply Hartville, OH	James Harris
Fostoria Concrete Products Fostoria, OH	Edward Vitt, Jr.
United States Steel Corp. Youngstown, OH	Eugene Badurich
United States Steel Corp. Youngstown, OH	George Fekety
Wheeling Pittsburgh Steel Corp. Youngstown, OH	Vincent Taglione
Gould Incorporated Cleveland, OH	Edward Andrush
Keen Transport Hudson, OH	Elton W. Blair
Consolidated Fibers Cincinnati, OH	James Corbin
Almac Plastics of Ohio Akron, OH	William Gibson
May Company Parma, OH	William Anderson
Spring Grove Cemetary Cincinnati, OH	Joseph McClouskey
Heron Testing Laboratory Solon, OH	Edward Szewcyk
General Electric Service Co. Cincinnati, OH	William Minifee
Colerain Youth Service Bureau Cincinnati, OH	Arthur Hall

In Ohio, available OSHA fatality data shows 44% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

OKLAHOMA WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Pride Feeder Adams, OK	Manuel Gallogos
Kewanee Industries Temple, OK	Archie Milburn Ewell Douglass Joe Lewis
Phillips Petroleum Co. Okmulgee, OK	Sam Manahan
Steelman Construction Co. Shawnee, OK	Raymond Gill
Combustion Engineering Oologah, OK	Richard Furry
Metro Electric Co. Tulsa, OK	Frank Shields
Retail Builders Tuttle, OK	Harry Drummond
Phillips Petroleum Bartlesville, OK	Miles Frisbee
Armco Co. Sand Spring, OK	Marion Shook
American Transfer & Storage Tulsa, OK	Larry Clark
Oklahoma Gas & Electric Arkoma, OK	James Hobbs
Union Equity Co-op Exchange Enid, OK	Leon Webster
Eckhardt Motors Inc. Oklahoma City, OK	Gary M. Neal

In Oklahoma, available OSHA fatality data shows 32% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

PENNSYLVANIA WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
K W Reese Incorporated Orbisonia, PA	Carowick Bradely
Bendix United Geophysical Corp. Ursina, PA	David Radzwion
R S Noonan Inc. York, PA	Charles Markline
Hempt Bros. Inc. Womelsdorf, PA	Rudolph Mitchell
Philadelphia Electric Company Philadelphia, PA	Rudolph Bauer
D & C Spinosa Company Mountain Top, PA	Thomas Hughes
Beaver and Casey Inc. Horsham, PA	Michael Shisler
Olympic Sand Blasting and Paint Mechanicsburg, PA	John Aggoures Chris Kamberis
John F McCarthy Inc. Philadelphia, PA	Ernest D. Gladle
John C McGinn Construction Mount Penn, PA	Michael McGinn
Roofcraft Incorporated Berwick, PA	Albert Forbes
John W Caldwell Corp. Philadelphia, PA	Carmen Capuano
K & M Erection Inc. McMurray, PA	Ronald Danne
Peg Tails Co. Inc. Hazleton, PA	Anthony Kasaide
Shelly & Fenstermacher Bally, PA	Wesley Landes
Rohm & Haas Co. Philadelphia, PA	John Flanagan

Company	Worker
Air Products and Chemicals Emmaus, PA	Charles Spaulding
1 BP Oil Inc. Div. of Standard Oil of O Trainer, PA	Waverly Towns
E I DuPont Denemours & Company Philadelphia, PA	Dominic DiPaoli
Firestone Tire & Rubber Company Pottstown, PA	Herbert Cory
Westinghouse Electric Corp. East Pittsburgh, PA	Jessie Lingard
PPG Industries Inc. Mt. Holly Spgs., PA	James Thrush
R L Zimmerman Company Clearfield, PA	Mario Puccio
E Devecchis and Sons Inc. State College, PA	Bradley Luse
United States Steel Corp - Fairless Fairless Hills, PA	Edward Baciho
Armco Inc. Ambridge, PA	Clyde Day
Hart Metal Inc. Tamaqua, PA	Scott Fetteman
Bigbee Steel and Tank Company Manheim, PA	Paul Polynine
Sonoco Products Company Milton, PA	Barton Weaver
American Electronic Laboratories Lansdale, PA	Joseph Kurnik
Savage Inc. Hamburg, PA	Harold Hamm
Smith Trucking Service Chester, PA	Boyd Bruce Carr
Interstate and Ocean Transport Philadelphia, PA	William Berseige Harry Yorksen
Fulton County Radio Inc. Station McConnellsburg, PA	David Fogg

Company	Worker
Pennsylvania Power and Light Co. Danville, PA	Warren Bass
Pennsylvania Power and Light Co. York Haven, PA	David Culbert Alfred Childs
West Penn Power Pittsburgh, PA	Dennis Dulaney
Manpower Incorporated Erie, PA	Michael Grasso
Firestone Equipment Repair Pittsburgh, PA	Bradley Durst
General Electric Service Comm. Hershey, PA	Robert Roland

In Pennsylvania, available OSHA fatality data shows 55% of workers' deaths occurred in S. 2153 "safe" workplaces.

RHODE ISLAND WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Campanella Corp. Block Island, RI	Tyrone Moreis
Carroll Products Inc. Wood River Junction, RI	Baij Chadher
Saylesville Warehouse Lincoln, RI	Richard Mead

In Rhode Island, available OSHA fatality data shows 60% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

TEXAS WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Workers
Pitchock Incorporated Palo Pinto, Texas	William R. Gibbs
Mobil Oil Corp. Denvery City, Texas	Jerry R. Grimes
Warren Petroleum Company, A Div. McLean, Texas	W.D. Clawson
The Ard Drilling Company, Inc. Sheffield, Texas	Crawford D. Spurlock
Helmerick & Payne International Allison, Texas	John L. Groves
Dresser Atlas Pearland, Texas	Jimmy Burton
Welltech Inc. Mid-Continent Div. Canadian, Texas	Dale Longstreth Paul Davis
Sharp Drilling Company, Inc. Ft. Stockton, Texas	Andy R. Rios
Phillips Petroleum Comp. Nat. Goldsmith, Texas	Bobby D. Gamble
Associated Erectors Company, Inc. Ft. Worth, Texas	Eddie Butler
Industrial Civil Div. of Brown Houston, Texas	Kenneth W. Wood
H.A. Lott, Inc. Houston, Texas	Wiley Robinson, Jr.
H.B. Zachry Company (Walden Walker) Dallas Texas	Garza Juan Rose
H.B. Zachry Company (Singleton Blvd.) Dallas, Texas	Mark P. Elroy
Half Case Construction Company, Inc. Dallas, Texas	William L. Smilor
J.D. Abrams, Inc. Dallas, Texas	Walter F. Elmore
A.K. Gillis & Sons, Inc. Alba, Texas	Adell Flournoy

Texas page 2

Company	Worker
E.E. Henry, Inc. Houston, Texas	Inocente Corona
Finway, Inc. Conroe, Texas	Gary A. Wilson
Brown & Root, Inc. (Nalco Freeport) Freeport, Texas	Carl L. Mathis
Brown & Root, Inc. Houston, Texas	Fred Guyeruski
Fish Engineering & Construction (West) Cason, Texas	Harmond G. Rushing Rodney C. Hearron
Fish Engineering & Construction Cason, Texas	Robert Smith
Chicago Bridge & Iron Company Addison, Texas	Hewlett Roy D. Jr,
Whitaker Electric Company, Inc. Houston, Texas	Joseph L. Bates
Sargent Electric Company of Texas Houston, Texas	James H. Sims
H.C. Price Company - Pipeline Div. Galveston, Texas	Clarence L. Nall
Allied Steel Construction Company Port Arthur, Texas	Robert D. McConnice
Browning & Ferris, Inc. Texas City, Texas	Perry John Payne
El Campo Rice Milling Company Louise, Texas	Michael R. Johnson
San Augustine Lumber Company San Augustine, Texas	Carl R. Skeeter
Gulf Oil Chemical Company Orange, Texas	Clifford Bunch
Constellation Checmical Company Palacios	Michael Richard
Central International Corporation Liberty, Texas	Paul Lumckissicks
Dixie Chemical Company Pasadena, Texas	John W. Bolden

Company	**Worker**
Southwestern Refining Company, Inc. Corpus Christi, Texas	George Thomas
Frazier & Frazier Industries Coolidge, Texas	Eric McGee
Ft. Worth F & D Head Company Ft. Worth, Texas	Joe Romero
Priester Supply Company, Inc. Arlington, Texas	Jim B. Nelson
Gulf States Utilities Beaumont, Texas	Lee Hickman
Santa Fe Trail Transportation Dallas, Texas	John Miller
L.B. Foster Company Houston, Texas	John F. Dean
Moore Supply Company Houston, Texas	Allen D. Moton
Sears Roebuck & Company Houston, Texas	William Buelow
Phillips Petroleum Company, Eng. Borger, Texas	Silas Willard Paul
Gene Ledel Shows, Inc. Richardson, Texas	David Holey
United Presbyterian Homes Waxahachie, Texas	Elvin Binghan

In Texas, available OSHA fatality data shows 28% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

VIRGINIA WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Eastern Madine Builders Cape Charles, VA	George Ford
Dan River Inc. Danville, VA	William Sykes
J. D. Bassett Manufacturing Basset, VA	Cicero Mays
Second Montclair Corp. Dumfries, VA	Gerald Nelson

In Virginia, available OSHA fatality data shows 31% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

WEST VIRGINIA WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978

Company	Worker
Dravo Corp. - Mobay Chemical New Martinsville	James Luster
	Michael Weber
	Robert Barrows
Carl Geupel Construction Co. Clarksburg	Wesley Bowles
Research Cottrell Inc. Willow Island	Richard L. Bowser
	Ray Deulley
	Darryl Glover
	Loren Glover
	James A. Harrison
	Kenneth V. Hill
	Tom G. Kaptis
	Willard H. McCown
	Robert B. Moore
	Edgar A. Phillips
	Raymond W. Poling
	Ray R. Rollyston
	Floyd Rupe
	Richard A. Stoke
	Brian H. Taylor
	Dale Wagoner
	Lewis D. Wildman
	Robert C. Riley
	Ronald Yocum
	Joseph V. Bafile
	James B. Blouir
	Robert W. Blouir
	Steve D. Blouir
	Thomas E. Cross
	Claude J. Hendricks
	Howard R. McBrayer
	Earnest Steele
	Emmett R. Steele
	Larry G. Steele
	Ronald D. Steele
	Kenneth E. Boring
	William R. Cunningh
	Roy F. Deem
	Alvin W. Goff
	Gary L. Gossett
	Daniel R. Hensler
	Roger K. Hunt
	Randy Lowther
	Ronald L. Mather
	Clayton F. Monroe
	Chet Payne
	Alan W. Sampson
	Glen Satterfield
	Jeffry Snyder
	Miles Steele
	Richard P. Swick
	Jackie R. Westfall

W. Va. - Page 2

Company	Worker
Superior Electrical Contractor Willow Island	Larry Deem Gary Hinkle
Lowry Masonry Charleston	Troy Fitzgerald
Bosley Construction Co. Charleston	Kenneth Bunner
Seal Treat Systems Charleston	Gerald Bacon Michael Merdler
Allied Chemical Corp. Moundsville	James Millard
The Kingsford Co. Piedmont	John Armentrout
Appalachian Power Co. Matewan	Marty Copley
Pittsburgh Testing Laboratory Willow Island	Fred Pride

In West Virginia, available OSHA fatality data shows 87% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

WISCONSIN WORKERS KILLED IN S. 2153 SAFE WORKPLACES IN 1978

→ Company	Worker
Elmer Lade Steel Erectors Pepin, WI	Eric Craener
Joe Lee Painting Service Muskego, WI	Frank Webber
Kubiak Builders Green Bay, WI	John Vim
Allis Chalmers West Allis, WI	George Wolffersdor
Mirror Aluminum Two Rivers, WI	Franz Pirdzsun
Mirror Aluminum Two Rivers, WI	John Reynolds
Crepaco Inc. Lake Mills, WI	Edgar Ewers
Okray Produce Co. Plover, WI	Donald Dwyer
Max Phillips and Son Equ Claire, WI	James Kolstad
Ace Services Milwaukee, WI	Donald Stauffacher
Wisconsin Sportservices Milwaukee, WI	Adolph Dirwells
Wisconsin Electric Power Neenah, WI	William Palmbach

In Wisconsin, available OSHA fatality data shows 30% of workers' deaths occurred in S. 2153 "safe" workplaces in 1978.

WORKERS KILLED IN S. 2153 "SAFE" WORKPLACES IN 1978 -

Background Information

OSHA furnished the AFL-CIO with two computer printouts containing fatality data for 1978.

The first computer printout listed companies where fatalities had occurred that were investigated by OSHA.

For those firms for which injury/illness data was listed, it was possible to compute whether or not the firm was exempt under S. 2153. Since these were 1978 deaths, injury data is from the preceding year, 1977.

The most conservative reading of the data was made. Those firms for which no data was recorded were dropped out. For the others a straight calculation from the data was made. For many employers, the size of the establishment was unclear in relation to number of injuries. For example, one firm reported 25 injuries among only two employees. It is probable that the data recorded those employees covered by the accident investigation and not the total number of employees. Most firms with small numbers of employees reporting would not have been exempt under S. 2153. A correct reporting of employment size would have undoubtedly resulted in a great number of these being exempt.

On the other side of the issue, numerous firms appeared on the printout as having zero injuries. Where the computer printout indicated the data was recorded during the inspection (this is designated by CY=1977), a straight calculation was made, meaning they would be exempt. Again where the computer printout indicated no data was reported (CY=00), these were dropped entirely.

The first printout was crossed by inspection numbers to a second printout which listed the name of the firms and the deceased. Lists for each state for which data existed were developed. Most states having state plans were either not included at all, or only a few entries were present. These states were dropped from any calculation.

Overall data for those states in the federal sector or state plan states for which data was recorded show the following:

489 fatalities in exempt firms

714 fatalities in non-exempt firms

476 fatalities - no data available.

Thus, available OSHA fatality shows 41% of workers deaths occurred in workplaces that had S. 2153 been in effect would have been exempted.

The CHAIRMAN. We now invite Mr. Mike McKevitt, director of Federal legislation for the National Federation of Independent Business.

Mr. McKevitt, we welcome you, and ask if you would introduce, if you would, your associates.

STATEMENT OF JAMES D. "MIKE" McKEVITT, DIRECTOR OF FEDERAL LEGISLATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, ACCOMPANIED BY SALLY DOUGLAS AND MICHAEL ROUSH, WASHINGTON OFFICE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. McKEVITT. Thank you, Mr. Chairman.

Joining me today is Ms. Sally Douglas and Mr. Michael Roush, both from our Washington office for the National Federation of Independent Business.

To begin with, Mr. Chairman, I would like to compliment you and Senator Schweiker for your openmindedness in holding these hearings on the Senate side, and we compliment you for your efforts.

I would like to briefly summarize my statement and submit the statement for the record.

The CHAIRMAN. It will be included for the record.

Mr. McKEVITT. In summary, I would like to say this, Mr. Chairman. There are basic flaws in the legislation that have contributed to and, perhaps, even insured OSHA's failure to significantly improve workplace safety.

OSHA's approach to workplace safety is based on four suppositions: Employers are, by nature, negligent in providing safe working places; employers are fully aware of OSHA rules and regulations; OSHA's standards are perceived as necessary and effective in improving workplace safety, and employers are the sole factor both in the cause and in the prevention of workplace accidents.

Not one of these points is unquestionably valid. The vast majority of employers, particularly small business employers, operate safe working places without even a single accident every year.

The small business employer is not aware of all of the thousands of OSHA rules and regulations, nor does he or she always understand what is expected of them when it does discover these regulations.

Third, OSHA standards are not perceived in many cases as having anything to do with eliminating or reducing those hazards which have been proven to cause serious injuries.

Fourth, economic and demographic conditions are not even considered by OSHA in its attempts to influence workplace safety if they are a significant factor in accident rates.

Viewing the employer as the sole determinant in the cause of and in the prevention of work accidents ignores totally the crucial role employees themselves play in causing and preventing accidents.

Current enforcement procedures impact only 25 percent of the workplace accidents. What is needed is to amend the act to provide OSHA with a clear, practical approach to workplace safety, based on reasonable expectations of what they can achieve.

OSHA should be an agency which administers a hazardous industries and occupations program, and not an all-correcting omnibus safety and health statute.

S. 1486 and S. 2153 would help accomplish this goal by removing safe businesses from OSHA's purview. Small business exemption would remove the burden OSHA has imposed on these firms, which have the least reason to suffer them and the least abilities to shoulder them. Exemption from OSHA is a powerful incentive for firms to maintain good safety records or improve those records to earn exemption.

As we have stated in the past, in the oversight hearings, we do support S. 1486, the Church proposal, and we also support S. 2153, the Schweiker-Williams proposal, as a compromise bill. But we would state that small business exemptions is only the first step in improving OSHA.

Exempting small businesses from OSHA's purview will provide these firms a well-deserved relief from unnecessary regulation and free OSHA to concentrate its efforts where they are more likely to be effective.

The reform of the OSHA Act must not stop there, for exemption will not, in and of itself, correct all the serious deficiencies and inequities inherent in the legislation.

Specifically, the following items must be addressed:

One. Absolute employer liability is both unjust and unwarranted.

Two. Employees should be held accountable for their actions.

Three. Employee negligence should be penalized in cases where such negligence results in the accident.

Four. Employees should be held liable for malicious or otherwise unwarranted complaints against an employer.

Appropriate action must be taken by OSHA to provide significant deterrents against making such complaints.

Next, requests for consultation services from any source should be considered prima facie evidence of an employer's good intent.

The employer's record on consultation must be taken into account during an OSHA inspection, and penalties for violations must be adjusted accordingly.

Next, establishment data rather than industry data should be the sole determinant for scheduling general inspections.

Next, inspectors should be fully cognizant of the safety records of each business they inspect and levy penalties in accordance with those records.

Next, inspections should focus solely on enforcement of standards which relate to the most common causes of serious injuries. Penalties should be levied only for those standards.

OSHA should focus its resources on establishments within industries where other agencies have no regulatory authority.

OSHA standards should be designed to permit businesses the flexibility to adopt any means which is effective in improving worker safety.

OSHA focuses must be changed to reflect results, rather than specific compliance procedures.

This list by no means covers all of the deficiencies, but it addresses what we feel are some of the most serious problems, which result in the greatest inequities. Correction of these defects is vital

if OSHA is ever to be perceived as offering constructive assistance to the business community in improving workplace safety, and indeed, that is the intent of the Act.

Thank you, Mr. Chairman.

[The prepared statement of Mr. McKevitt follows:]

NFIB National Federation of Independent Business

STATEMENT OF

JAMES D. 'MIKE' McKEVITT

DIRECTOR OF FEDERAL LEGISLATION
NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Before: Committee on Labor and Human Resources

Subject: Legislative Proposals to Amend the Occupational Safety and Health Act

Date: April 25, 1980

Mr. Chairman, the National Federation of Independent Business (NFIB), which represents more than 600,000 small and independent business firms across the nation, welcomes this opportunity to comment on the proposed legislative reform of the Occupational Safety and Health Act of 1970.

In the ten years since OSHA was created, billions of dollars have been spent by the government to develop and enforce thousands of safety standards in the workplace. Industry has spent additional billions to comply with these standards. Considerable time and energy has been expended by government officials, labor unions, business owners, the media, and the general public in publicizing and/or analyzing the actions and effects of OSHA. To what avail? OSHA has generated a wellspring of controversy while failing to achieve any significant impact on occupational safety and health.

Clearly, OSHA is in need of reform. As we stated in testimony before this Committee last month, "administrative reform may alleviate some of the problems but it cannot alter significantly the direction of the agency, for it cannot correct the basic flaws in the legislation which are responsible for that direction.1/ Before discussing the particular bills before this Committee I

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would like to address the basic legislative flaws that we believe have contributed to -- perhaps even assured -- OSHA's failure to become the positive influence on workplace safety it was intended to be.

The creation of OSHA in 1970 was a milestone in governmental efforts to improve occupational safety and health. Regulation of industrial safety had begun in the nineteenth century, but largely had been conducted on the state level with minimal federal involvement. Little pressure could be brought to bear to support federal intervention, since occupational injury and death rates declined over most of the first sixty years of this century.

OSHA's creation was, in fact, accomplished as a result of a number of reasons, not the least of which was political. Nevertheless the widely-advertised reason for establishing a pervasive federal involvement in occupational safety was the increase in the workplace accident rate which began in the mid-1960's -- an increase which Congress perceived as reaching "crisis" proportions and which could only be resolved by federal intervention. Recent studies, however, demonstrate a distinct correlation between variations in the level of business activity and changes in the age distribution of workers on the one hand and workplace accident rates on the other. One study, examining the manufacturing sector from 1948 to 1970, attributed 41% of the year-to-year injury rate changes to variations in the level of business activity. When the changes in the age of the work force (a proxy for work experience) are factored in, the figure rises to 53%.2/ As the author of the study points out, the Congress reacted in 1970 "to what seemed a new situation requiring a new public policy response. The situation was not new, however, but a transitory predictable response to an influx of younger workers and a sustained high level of business activity."3/

Economic and demographic conditions -- factors which in large part operate independently of any particular employer -- play a significant role in determining workplace accident rates. Yet these conditions were not taken into consideration when the OSH Act was passed, nor are they being taken into account in OSHA's New Directions policies. Basil Whiting, Deputy Assistant Secretary of Labor for Occupational Safety and Health, confirmed OSHA's failure to account for long term trends when he said, "Congress recognized in passing this legislation that the marketplace had failed to provide adequate protection for American workers."4/ OSHA clearly is unwilling to focus on causal factors which cannot be correlated with the actions of particular employers. Yet such factors will never be influenced by OSHA's mandated, rigid approach to workplace safety, focused as it is on absolute employer liability, inspections and complusory safety rules, all of which require the same method of prevention in each firm for each year. Unless OSHA adopts a more flexible attitude, in which differing methods of prevention are designed and implemented to suit varying circumstances, the agency will continue to be ineffective in countering factors which necessarily accompany a dynamic economy.

Failure to recognize economic and demographic conditions as causal factors in occupational safety trends is only one flaw affecting the agency's performance. Equally serious is the assumption that federal intervention of and by itself can correct whatever failings in the marketplace might exist:

> Theoretical or practical misfunctionings in private markets should not be compared with a theoretical ideal of perfect government intervention, that is, socially optimal production by government fiat. The relevant comparison is between the practical realities of the market place and the practical realities of government regulation."5/

Practical realities are not reflected in the agency's mission, i.e. "to assure as far as possible every working man and woman in the nation safe and healthful conditions." Implicit in the law is an assumption that OSHA must guarantee each worker a virtually risk-free workplace. While it is not our intention to diminish the serious effects of workplace injuries for employees, their families and society as a whole, the whole question of occupational risk must be put in perspective. Everything we do entails some element of risk. Yet job-related risks, according to available statistics, seem significantly lower than many other risks we face in the normal course of living. According to figures published by HEW, the workplace is a safer place to be than virtually anywhere else, including the home (see Table 1). In fact, "fully a third of all employed persons confront a risk of being injured on the job that is lower than the risk of living in general".6/

Clearly the attention focused on occupational risks is disproportionate to their impact. Even if this were not so, there would still exist practical limitations to what a government agency can reasonably expect to accomplish in improving worker safety. Recognition of these limitations is implicit in OSHA's new policies to target high-risk industries, in attempting to focus finite resources on those areas where the greatest potential for cost-effectiveness exists. Yet there is still no recognition on OSHA's part that finite resources not only impose practical limitations on the agency's ability to perform; they also impose substantial limitations on an employer's ability to comply. OSHA believes that their enforcement policies -- scheduled inspections, complaint inspections, first-instance sanctions -- "provide a significant incentive to employers to improve conditions within the workplace *before* an accident or an OSHA inspection occurs.."8/ The validity of OSHA's assertion is highly questionable, as it presupposes several things: 1) employers are by nature negligent in providing safe workplaces; 2) employers are fully cognizant of OSHA rules and regulations; 3) OSHA's standards are perceived as being necessary and effective in improving workplace safety; and 4) employers are the sole factor both in the cause and in the prevention of workplace accidents. Not one of these four points can be categorically supported in all cases. First, the vast majority of employers -- most particularly small business employers -- are every bit as concerned as OSHA

TABLE 1

NUMBER OF PERSONS INJURED AND NUMBER OF PERSONS INJURED PER 100 PERSONS PER YEAR, BY CLASS OF ACCIDENT, SEX, AND AGE: UNITED STATES, 1976

[Data are based on household interviews of the civilian noninstitutionalized population. The survey design, general qualifications, and information on the reliability of the estimates are given in appendix I. Definitions of terms are given in appendix II]

SEX AND AGE	TOTAL	CLASS OF ACCIDENT				
		MOVING MOTOR VEHICLE		WHILE AT WORK	HOME	OTHER
		TOTAL	TRAFFIC			
	NUMBER OF PERSONS INJURED IN THOUSANDS					
BOTH SEXES						
ALL AGES	69,428	4,611	4,107	9,292	25,067	27,383
UNDER 6 YEARS	7,815	*	*	...	4,790	2,576
6-16 YEARS	14,598	*	*	...	5,061	7,923
17-44 YEARS	29,166	2,751	2,446	6,877	7,271	12,444
45-64 YEARS	10,012	758	605	2,278	2,962	3,463
65 YEARS AND OVER	6,137	*	*	*	2,688	1,182
MALE						
ALL AGES	37,093	2,151	1,875	7,496	12,556	15,437
UNDER 6 YEARS	4,205	*	*	...	2,902	1,480
6-16 YEARS	9,278	*	*	...	4,256	4,851
17-44 YEARS	17,340	1,362	1,257	5,586	3,727	7,996
45-64 YEARS	4,633	*	*	1,892	1,705	3,161
65 YEARS AND OVER	1,480	*	*	*	796	*
FEMALE						
ALL AGES	32,335	2,461	2,232	1,796	12,461	12,150
UNDER 6 YEARS	3,160	*	*	...	1,887	1,173
6-16 YEARS	5,320	*	*	...	2,065	3,072
17-44 YEARS	11,826	1,390	1,250	1,370	4,334	4,097
45-64 YEARS	5,379	*	*	*	2,237	2,362
65 YEARS AND OVER	2,650	*	*	*	1,838	785
	NUMBER OF PERSONS INJURED PER 100 PERSONS PER YEAR					
BOTH SEXES						
ALL AGES	31.1	2.2	1.9	4.4	12.3	13.1
UNDER 6 YEARS	30.7	*	*	...	25.4	13.6
6-16 YEARS	30.2	*	*	...	15.1	18.9
17-44 YEARS	34.6	3.3	3.1	8.1	9.8	14.7
45-64 YEARS	23.1	1.7	1.4	5.3	9.1	8.0
65 YEARS AND OVER	19.0	*	*	*	12.1	5.6
MALE						
ALL AGES	34.5	2.1	1.8	7.4	13.3	15.2
UNDER 6 YEARS	45.0	*	*	...	30.9	14.5
6-16 YEARS	43.4	*	*	...	20.1	22.7
17-44 YEARS	42.3	3.7	3.3	13.4	9.1	18.6
45-64 YEARS	22.5	*	*	9.0	8.3	7.6
65 YEARS AND OVER	16.6	*	*	*	8.9	*
FEMALE						
ALL AGES	28.2	2.2	2.1	1.6	11.4	11.1
UNDER 6 YEARS	34.2	*	*	...	19.3	12.7
6-16 YEARS	25.8	*	*	...	9.9	14.9
17-44 YEARS	27.1	2.9	2.7	3.1	10.4	11.2
45-64 YEARS	23.8	*	*	*	9.6	10.2
65 YEARS AND OVER	20.6	*	*	*	14.3	5.5

NOTE: EXCLUDED FROM THESE STATISTICS ARE ALL CONDITIONS INVOLVING NEITHER RESTRICTED ACTIVITY NOR MEDICAL ATTENTION. THE SUM OF DATA FOR THE FOUR CLASSES OF ACCIDENTS MAY BE GREATER THAN THE TOTAL BECAUSE THE CLASSES ARE NOT MUTUALLY EXCLUSIVE.

The appropriate relative standard error of the estimates shown in this table are found on page 46.

Source: Vital and Health Statistics,
Current Estimates from the Health
Interview Survey U.S.-1976, U.S.
Department of Health, Edcuation and
Welfare.

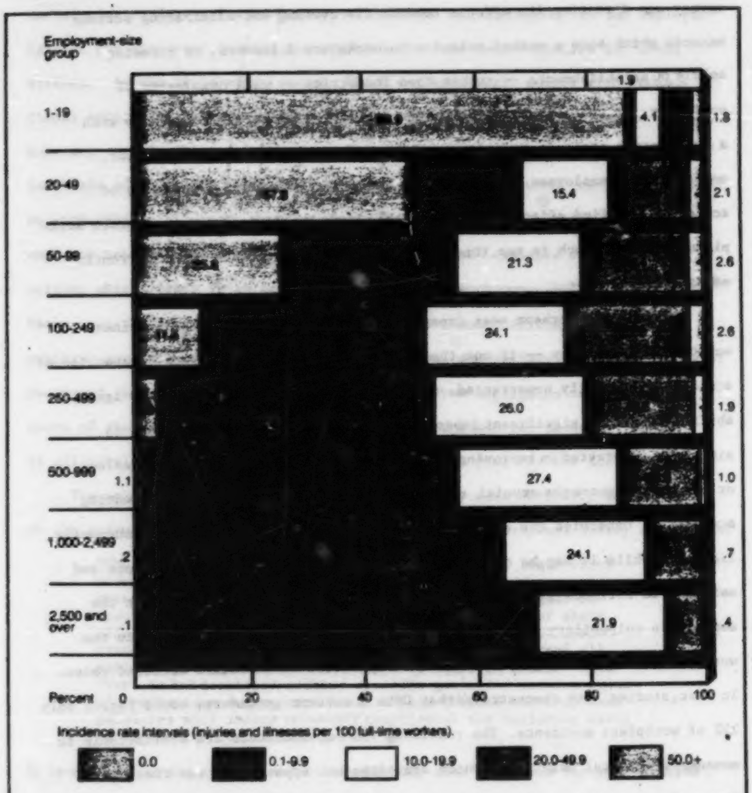
about worker safety, and have devised, on their own initiative, work practices and management techniques to effectively prevent accidents. In fact, these employers have accomplished considerably more than OSHA, given its direction and tactics, ever will. If this were not true, considerably more accidents would occur than is the case.

Second, the preponderance of OSHA standards virtually insures that the small business employer will not even be aware of the vast majority of OSHA rules, much less fully cognizant. Nor, if he is aware of some of the standards, is there any assurance that he will understand completely what is expected of him. Nearly all of the thousands of standards adopted or developed by OSHA were devised by technical experts for technical experts. Little consideration was give. to making these standards understandable to the layman, nor is there any evidence that the limitations inherent in small firms vis-a-vis large firms was taken into account. Yet despite their overwhelming ignorance of the intricacies of OSHA standards, small business employers by and large operate safe workplaces with no accidents year after year (see Table 2).

Good safety records -- accomplished by their own and their employee's efforts -- are a major reason for small firms' distrust and disdain of OSHA. OSHA standards are not, by and large, perceived as being necessary and effective in improving workplace safety. Time after time, we receive letters and calls from members who have maintained accident-free businesses for ten, twenty, even thirty years, who deeply resent the OSHA inspector's explicit assumption of employer negligence, refusal to take into account the employer's safety record, the eagerness to cite each and every nit-picking defect, and the ignorance regarding particulars of the business. We have also received communications from members who have complied with an OSHA inspector's directives and subsequently had a serious accident occur as a direct result of the directive. Employer's perceptions of

Table 2

Percent distribution of private sector establishments by total INJURY AND ILLNESS incidence rate interval and employment-size group, United States, 5-year average, 1973-77



NOTE: A rate of 0.0 implies that no case of an injury or illness was reported or, if recordable cases occurred, they were insignificant in terms of the exposure hours as the rate calculated was less than .05 per 100 full-time workers.

Source: Occupational Injuries and Illness in the United States by Industry, 1977, U.S. Department of Labor, Bureau of Labor Statistics, January, 1980.

OSHA's effectiveness might well alter if there were any indication that the agency was directing its efforts towards discovering and eliminating serious hazards which bore a marked relation to workplace accidents, or focusing solely on establishments -- rather than industries -- with high rates of accidents, or even substituting the traditional adversary relationship with a cooperative attitude towards workplace safety, in which the government, employers and employees work together to discover the underlying causes of accidents and find effective and equitable ways to eliminate or ameliorate workplace hazards. Such is not the case, nor is it likely to be under currently mandated procedures.

Finally, and perhaps most importantly, OSHA's unshakeable belief that employers are the key -- if not the sole -- factor in the cause and prevention of accidents is totally unwarranted, and in fact seriously diminishes the agency's ability to effect significant improvement in workplace safety. If OSHA is sincerely interested in improving worker safety, it cannot afford to overlook or purposely ignore the crucial role employees play in causing and preventing accidents. Otherwise the agency's effectiveness will continue to be inherently limited. While it may be convenient -- or politically astute - to adopt and maintain an attitude toward occupational hazards which focuses solely on the employer's culpability and on modifications to the physical equipment in the workplace, such a policy will do relatively little to influence accident rates. In fact, studies have demonstrated that OSHA's current procedures could impact only 25% of workplace accidents. The remaining 75% of accidents are attributable to momentary physical hazards -- which are often not apparent at the time of the inspection -- and to employee behavioral factors.9/ The employee's role in preventing accidents can no longer be dismissed by OSHA. In fact, a careful reading of the OSH Act clearly shows that Congress was, at least in part, aware of the employee-accident correlation and that OSHA's refusal to address this correlation in favor of a conferment of absolute responsibility on the employer ignores the statutory command for employees to take responsibility for their actions. As the legislation states, "Each employee shall comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this Chapter which are applicable to his own actions and conduct"10/ (emphasis added). The problem in this case is not so much with the legislation as with OSHA's failure to develop standards, rules, and regulations on employee behavior. For example, OSHA should fine an employee for negligent actions which result in an accident. Clearly, in such cases the employee is at fault, yet the employer bears a disproportionate amount of the burden. The employer pays the costs of worker's compensation, and suffers the consequences of decreased productivity, even when the employee's own negligence is clearly the cause of the accident. OSHA's present system compounds the inequity, since in all likelihood the employer will be penalized by OSHA for the accident.

The major defects of OSHA's enforcement policy were admirably summed up in the recent report of the Interagency Task Force on Workplace Safety and Health:

> "The agency has taken few steps in the past to learn which standards-violations cause serious injuries or are most detectable by periodic inspection. It has not designed inspection strategies to make meaningful evaluations of their effectiveness possible. It has diluted the impact of inspections it does conduct by attempting to find and correct all violations, regardless of whether they cause injuries. Moreover, it has developed neither specific goals for various types of inspections nor a comprehensive plan (beyond the idea that penalties will induce voluntary compliance) for tailoring civil penalties to promote such goals."11/

It is most heartening to NFIB and its membership that this Task Force -- chaired by Secretary of Labor Ray Marshall -- points out many of the same concerns and criticisms as NFIB and other groups have regarding OSHA's performance to date. While we realize that the Task Force was given no authority beyond reporting its findings and issuing recommendations, we feel strongly that the mere fact that government officials recognized the same problems with OSHA that small businesses perceive, but reached these conclusions through independent research, should lend a certain credence to the report that small business positions have never been accorded, given the claims of self interest as touted by detractors.

OSHA's problems are real. They are not fabricated in the minds of business owners, and they will not be resolved until a clear and practical approach to government involvement in workplace safety is devised. Administrative reform has consisted largely of cosmetic changes designed to promote a more favorable public relations image of the agency. The basic structure has not changed, nor can it unless the act itself is revised. As the Task Force report states, "both workers and employers might be better served by administering and promoting the OSH Act as a hazardous industries and occupations program rather than an all correcting omnibus safety and health statute."12/ Simply administering the Act in such a fashion is insufficient, however, for unless the mandate is changed, there will always be a tension between the letter and the spirit of the law. It is this tension which is largely responsible for the polarization between business and labor and if left in place, will perpetuate the conflicts, leaving everyone dissatisfied.

Growing recognition in Congress of the onerous burdens imposed by OSHA on the small business community has prompted the introduction of numerous bills to either reform or abolish the agency. Several notable attempts have been made to remove specific segments in the business sector, i.e. small farms and small businesses, from OSHA's purview. Some have succeeded, some failed. At best, these efforts have resulted in securing temporary relief rather than a permanent solution. The bills under consideration by the Committee -- S.1486, S.2153, and the court costs bill -- are a much needed step both in improving OSHA's effectiveness and in removing the unnecessary, inequitable burdens imposed by the agency on small firms. Moreover, these proposals recognize that OSHA's focus should be on results rather than on the methods by which these results are produced.

Noone, not even the agency's most ardent supporters, can argue with the fact that the agency's resources are finite. Therefore, it only makes sense to allocate these resources where they will likely do the most good. Of the more than 5 million establishments under the agency's purview, fewer than 450,000 establishments, or less than 10% of the total, experienced even one lost workday case in 1976.13/ The overwhelming majority of small firms have no accidents -- serious or non-serious -- in any given year. If results such as these are really what OSHA and its supporters are trying to achieve, what sense does it make to treat all employers alike, to make everyone suffer the same burdens, to give no reward to those employees who maintain safe workplaces, to give them no incentive to continue their admirable efforts? OSHA maintains that it is vital to the protection of workers that the agency's "presence" be felt throughout the small business community. To quote Secretary Whiting, "exemptions eliminate virtually all of the incentive for small businesses in these industries to undertake voluntary compliance."14/ We have two questions regarding Mr. Whiting's assertion. First, on what basis can he possibly make such a claim since the only exemption -- aside from paperwork requirements -- that has ever been enacted for small, non-agricultural firms only went into effect this year, and we have seen no indication of a significant rise in the injury rate among exempted firms? Second, and more importantly, Secretary Whiting's statement reaffirms OSHA's commitment to methods rather than ends. To say a small business is in non-compliance with an OSHA standard is not always the same thing as saying the small business isn't safe.

Given OSHA's inspection policies, it is reasonable to assume that a substantial number of businesses exempted under either S.1486 or S.2153 have not been regularly inspected by OSHA, if at all. In view of the statistics, how then can OSHA maintain that its "presence" is the only mechanism which operates to insure the worker's protection? Quite obviously, most employers maintained safe workplaces before OSHA existed. They will continue to do so on their own initiative with or without OSHA's presence.

NFIB has long supported an exemption from OSHA for those small firms which have maintained good safety records. We strongly supported the amendment to the small business omnibus bill that was sponsored by the late Senator Dewey Bartlett of Oklahoma in the last Congress, and we continue to support it in its present form S.1486, as introduced by Senator Frank Church of Idaho.

OSHA and its supporters have argued against the blanket exemption approach, maintaining that it establishes an inequitable system whereby safe employers in high-hazard industries would gain no benefit from the exemption, whereas unsafe employers in low-hazard industries would gain a benefit they do not deserve. There is some validity to this argument, although tailoring the exemption to industry rates rather than establishment records is no different from OSHA's practice of scheduling inspections in terms of industry grouping, rather than on a particular business' record. In some few cases, employers who should be rewarded will not be, and some who have not earned the reward will be given it anyway. To refuse to grant an exemption on this premise, however, is unjustified. For the small business community as a whole, the benefits to be gained by this type of exemption are significant. No longer will a large number of small businessmen and women need to worry about OSHA's harassment. There will be no need to fear costly penalties for violations of standards which have nothing to do with a safe workplace. The arbitrary actions of arrogant inspectors will no longer be a matter of concern to many small firms. In view of this, we feel strongly that a blanket exemption for firms with ten or fewer workers in non-hazardous industries is not only warranted but just. Such an exemption is without a doubt a significant improvement over the current situation, in which no small firm employer is given an advantage over any other despite his or her proven ability to run a safe shop. Further we believe that a blanket exemption will provide a real incentive to businesses in non-exempt industries to make a concerted effort to improve their safety records. Just as each vote in a general election can make a difference in the aggregate sense, so can the actions of each employer make a difference in improving the industry-wide accident rate.

S.1486 would do little more than codify OSHA's present policy of focusing resources on high-hazard industries where presumably they can produce the greatest results. It has been said that, with OSHA finally beginning to move in the right direction, codification of present policy is unnecessary. NFIB strongly disagrees with this argument. For one thing administrative policies can change at a moment's notice. What is to prevent OSHA from reverting to its former practices if the law is not altered to bolster, indeed command, the agency to continue what it refers to as its "commonsense" approach to worker safety? As we stated before, OSHA's mandated mission is too broad, too vague in focus, for anyone to reasonably expect its fulfillment. Yet until that mission is re-defined there will always be a danger that the tension between carrying out the spirit or the letter of the law will become all compelling and OSHA will once again revert to its former approach rather than continuing to improve its performance and focusing on the areas of greatest need. If this happens, small business will bear the greater share of burden.

As I stated, NFIB strongly supported the concept of S.1486 when it was presented as the Bartlett amendment in the last Congress. While there are some technical difficulties with the bill, we continue to support this approach as one that is equitable and beneficial to the small business community as a whole. If this committee should decide against S.1486 and all other reforms which offer meaningful relief to small firms, NFIB will once again take the fight to the floor of the Senate Chamber to enact this proposal. We have every reason to be certain that the Senate will again look with favor on a blanket exemption, just as they did when they so overwhelmingly passed the Bartlett amendment.

Although our membership clearly favors the approach embodied in S.1486, having voted 88% in favor of an exemption for small business in non-hazardous industries (NFIB Mandate #417), NFIB is prepared to lend its support to the alternative approach embodied in S.2153. We wish to commend the Chairman and the Ranking Minority Member of this Committee for sponsoring the bill. Your sponsorship indicates a willingness to seek solutions to the problems generated by OSHA over the last ten years, as well as a recognition that small firms need and deserve relief from unnecessary regulation. S.2153 has some advantages over S.1486, and it suffers from some disadvantages as well. On a positive note, the exemption provided for in S.2153 is more appealing than a blanket exemption, for it is tailored to the establishment rather than the industry. Philosophically, this is a more acceptable approach to NFIB and I should imagine should effectively answer the concerns of opponents of S.1486, at least in respect to its equity. Under S.2153, no business that is not deserving of an exemption will be granted one. On the other hand, all firms who have demonstrated their abilities to eliminate or severly restrict serious accidents in their workplaces will be entitled to an exemption from OSHA. Those businesses which do not qualify in any given year are given encouragement to do so, since reduction of injuries will have an immediate impact on their status vis-a-vis OSHA. Like S.1486, real incentive exists for firms to achieve and maintain good safety records, since failure to do so will result in the business being again subjected to OSHA's regulation.

If it is truly the intent of OSHA to insure safe workplaces and not simply to regulate for regulation's sake, it is difficult to see how OSHA and its supporters can argue with the reasonable approach in S.2153. The bill's purpose is merely to reward firms whose efforts result in good safety records, and to provide incentives for maintaining these records. In fact, S.2153 is a compromise between the demands of labor and industry. Unlike S.1496, S.2153 provides for specific types of inspection -- complaint, health, abatement and accident inspections -- even in exempt businesses. The bill also seeks to minimize the paperwork burden which might otherwise ensue by determining eligibility for the exemption through use of an already existing mechanism -- worker's compensation data. There are some problems with this approach however, the first being the perception in industry that use of this data for an OSHA exemption may well represent the first step towards federalization of the worker's compensation program. There is some validity to this perception, since the language in S.2153 contains an authorization for the Secretary of Labor to make grants to assist the States in improving the administration of the program (Sec. 3(i)). We would urge that this language be altered to insure that grants to state worker's compensation agencies be made solely to assist them in providing the information necessary to administer the exemption, and not for any other purpose.

We are aware that worker's compensation data are not comparable from state to state nor automatically accessible to OSHA. Further we recognize that the Bureau of Labor Statistics will not disclose the establishment data it collects for direct enforcement purposes. Nevertheless, these problems can be overcome, and S.2153 recognizes this by providing financial incentives to the states to modify their data systems to enable them to report the minimal information needed to determine exemptions. The effort is worth it, both for the benefits to be gained by safe businesses and for OSHA itself. The use of establishment data will make OSHA significantly more effective by enabling a precise targeting of its resources to those firms which are hazardous. Enforcement efforts which rely on industry figures will never be as effective, since there will always be a significant likelihood of inspecting businesses which have good safety records, even though they are in a high-hazard industry grouping.

Secretary Whiting has stated that OSHA has already begun to examine the feasibility of using workmen's compensation data to improve its targeting efforts, as well as attempting to develop an inspection program which focuses on the most common hazards which result in the most injuries. OSHA is also attempting to find ways of encouraging firms to establish safety committees and seek consultation. It seems apparent that OSHA is moving in the same direction as S.2153. Viewed in this light, the bill merely codifies the approach to workplace safety that OSHA seems to be adopting. Enactment of this bill is necessary to insure that this approach is continued.

Exempting safe businesses from OSHA's purview will provide these firms a well-deserved relief from unnecessary regulation and free OSHA to concentrate its efforts where they are more likely to be effective. But reform of the OSH Act must not stop there, for exemption will not, in and of itself, correct all the serious deficiences and inequities inherent in the legislation. Specifically, the following items must be addressed:

--absolute employer liability is both unjust and unwarranted .

--Employees should be held accountable for their own actions.

--Employee negligence should be penalized in all cases where such negligence results in an accident-

--Employees should be held liable for malicious or otherwise unwarranted complaints against an employer. Appropriate action must be taken by OSHA to provide significant deterrents against making such complaints.

--Requests for consultation services from any source should be considered prima facia evidence of an employer's good intent. An employer's record on consultation must be taken into account during an OSHA inspection, and penalties for violations must be adjusted accordingly.

--Establishment data rather than industry data should be the sole determinant for scheduling general inspections.

--Inspectors should be fully cognizant of the safety records of each business they inspect, and levy penalties in accordance with those records.

--Inspections should focus solely on enforcement of standards which relate to the most common causes of serious injuries. Penalties should be levied only for those standards.

--OSHA should focus its resources on establishments within industries where other agencies have no regulatory authority.

--OSHA standards should be designed to permit businesses the flexibility to adopt any means which is effective in improving worker safety. OSHA's focus must be changed to reflect results rather than specific compliance procedures.

This list by no means covers all the deficiencies, but it addresses what we feel are some of the most serious problems which result in the greatest inequities. Correction of these defects is vital if OSHA is ever to be perceived as offering constructive assistance to the business community in improving workplace safety -- if indeed that is the intent of the Act.

Thank you.

ENDNOTES

1/ Statement of James D. "Mike" McKevitt, Before the Senate Committee on Labor and Human Resources, March 21, 1980.

2/ James R. Chelius, "Economic and Demographic Aspects of the Occupational Injury Problem, Quarterly Review of Economics and Business, Summer, 1979, pp. 65-70.

3/ Ibid

4/ Testimony of Basil Whiting before the Senate Committee on Labor and Human Resources, March 21, 1980.

5/ James R. Chelius, Workplace Safety and Health: The Role of Worker's Compensation, Washington, DC, American Enterprise Institute for Public Policy Research, 1977, p.3.

6/ OSH Act, Section 2(b)

7/ Chelius, Workplace Safety and Health: The Role of Worker's Compensation, p. 1.

8/ Whiting statement

9/ State of Wiconsin, Dept. of Industry, Labor & Human Relations; Inspection Effectiveness Report, Sept. 28, 1971

State of Idaho, Industrial Commission, Statistics Division; Preliminary Report for 1973 Fiscal Year Survey of Injury Due to Occupational Accidents or Illnesses.

California Department of Industrial Relations, Dir. Management Anlysis; Develpment of INspection Vaule Index, June 30, 1973.

Interagency Task Force on Workplace Safety and Health, First Recommendations Report, August 1, 1978

10/ OSHA Act, Section 5(b)

11/ Task Force, III-2.

12/ Ibid, p. I-8.

13/ Task Force III-31

The **Chairman**. Let me ask first, does your organization favor blanket exemptions, or does it favor exemptions which are based on the proven performance of the individual workplace. Really, from your statement, as I read it, you have made observations that go both ways, and I am just wondering which way you would have us conclude you would prefer to go in terms of exemption.

Mr. **McKevitt**. Let me defer to Ms. Douglas on this, who has done quite a bit of work on this.

Ms. **Douglas**. Senator, we have traditionally supported the blanket exemption approach from the time that Senator Bartlett introduced that sort of approach in the last Congress, up to the present.

However, we see some very important things in S. 2153, such as the establishment approach as opposed to the industry approach, which we think is more equitable on both sides. In other words, one of the big problems with the blanket approach is—and I think it has some merit—the criticism that the blanket approach would exempt an industry grouping and make no provision for either the individual businesses within a low-hazard industry group, which are themselves high hazards, or conversely, within the high-hazard industry group, those businesses which have operated safe workplaces.

I do not see this problem occurring in S. 2153, if you are taking the businesses' particular safety records into account, then I think you would remove that possible problem.

The **Chairman**. You have come to the conclusion that there are risks in small business establishments, even though they might be included in the low-risk, SIC category.

Ms. **Douglas**. That is correct, Senator.

The **Chairman**. Let me turn to Senator Schweiker, and then I might come back to one or two questions.

Senator Schweiker?

Senator **Schweiker**. Thank you, Mr. Chairman.

You indicated in your statement that you strongly support S. 1486, which is Senator Church's bill, which would completely exempt nonhazardous small business from OSHA. My bill would not do that. It would preserve health inspections, complaint inspections, and duties, to comply with all health and safety law. Yet, you support my bill as a compromise.

What is your basic judgment of these two bills?

Ms. **Douglas**. Senator, basically, the reason that we have a very strong supportive position of the blanket exemption is because NFIB determines its positions on legislation from votes of our membership. We specifically mandated the blanket exemption approach to our membership——

Senator **Schweiker**. As the Church bill does.

Ms. **Douglas** [continuing]. Yes, sir—and 88 percent of our membership voted in favor of that approach. At the time that we took the mandate, that was the only approach available to us. Since then, you have introduced as S. 2153—which, as I have said, has some very cogent ideas in it, that is, the establishment approach. We do not have a mandate vote on that, but given our perceptions of our membership's feelings on OSHA, given the historical background of this when Senator Bartlett's amendment passed the Senate and then went to the House-Senate conference on the small business bill, there was a compromise amendment introduced in the conference which answered some of the concerns and criticisms, such as the exemption from health inspections, the complaints, et cetera, and we supported that compromise. Our membership supported us in that effort, so we see no reason to believe that your bill would be unacceptable to them.

Senator SCHWEIKER. Mr. McKevitt?

Mr. McKEVITT. Going back to Senator William's comment, we do not at all contend that there is total workplace safety in small business. There are areas—for example, brake shops, construction foundries, paint shops—where you do have concern for worker safety, and you do have some dangers there. We should see that a concern is shown toward that. But we would like to see more direction by OSHA in that direction where there is a clear and present danger, rather than some of the nitpicking which still goes on by many of the inspectors.

Senator SCHWEIKER. I guess my question is, Do you see my bill as a compromise between the Church bill and the present law?

Mr. McKEVITT. Yes.

Senator SCHWEIKER. In your testimony, which I did not have time to read—and we will put the whole thing in the record—you do have a quote that I would like to ask you about.

You point out that President Carter appointed a task force to study OSHA, and one of the cochairmen of the task force was none other than Ray Marshall, the Secretary of Labor. And here is what he said in President Carter's report:

> OSHA has taken few steps in the past to learn which standards violations cause serious injuries or are most detectable by periodic inspection. It has not designed inspection strategies to make meaningful evaluations of their effectiveness possible. It has diluted the impact of inspections it does conduct by attempting to find and correct all violations, regardless of whether they cause injuries. Moreover, it has developed neither specific goals for the various types of inspections nor a comprehensive plan for tailoring civil penalties to promote such goals.

I think that is a very good quote, because it is interesting that this was Carter's task force; it was the Secretary of Labor's report, it is his wording. Isn't this really the problem, in your judgment?

Mr. McKEVITT. That is correct, Senator. I wish OSHA would be more open about it. We, for example, have just had very successful meetings with Wage and Hour, trying to make this thing simpler for these small businesses who do not have the expertise on the variety of regulations. If OSHA would do this, as suggested by the Secretary, I think it would be a step in the right direction.

Senator SCHWEIKER. Secretary of Labor Ray Marshall is saying much the same thing as what I have been attempting to do, what you are saying here, and that is what the Carter task force was set up to do. And I am glad that at least we have some objectivity before the polarization set in, to at least appraise what we are trying to do.

That is all I have, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. McKevitt, Ms. Douglas, and Mr. Rausch.

We invite Mr. John Sheehan, legislative director of the United Steelworkers of America, to our witness table and to our deliberations.

Mr. Sheehan, we appreciate your appearance and your statement, which I know will be useful and constructive, and we will follow it with care and with all of our thought. We welcome you, together with Mr. Wright.

STATEMENT OF JOHN J. SHEEHAN, LEGISLATIVE DIRECTOR, UNITED STEELWORKERS OF AMERICA, ACCOMPANIED BY MIKE WRIGHT, INDUSTRIAL HYGIENIST, AND STEVE NEWMAN

Mr. SHEEHAN. Thank you, Senator.

The CHAIRMAN. The place lit up for you all of a sudden, John, did you notice that?

Mr. SHEEHAN. Well, you can see we are accompanied by a lot of people and things, and we appreciate your understanding of this process.

Senator SCHWEIKER. You have your own television crew here today.

Mr. SHEEHAN. That is right, Senator. And we have, as you know, here, members of our union, primarily from eastern Pennsylvania, and I believe parts of New Jersey, and a little bit from Maryland. And most of them, Senator, are not big steel mill workers. These are people who work in fabricating plants, under 500. So you can see that this does have an impact on us. I know on occasion, people have indicated well, how does this affect a large steel mill? The people who are here today with us are those that work in smaller fabrication shops.

I am accompanied by Mike Wright, who is an industrial hygienist from the Pittsburgh office, and Steven Newman, who has been doing some study on the lost workday data.

My name is John Sheehan. I am the legislative representative of the Steelworkers Union. We do have a summary text of our comments, and you also have our statement, and I would like to merge some of them together, if that is all right with you.

The CHAIRMAN. Fine.

Mr. SHEEHAN. I will start by reading from our general statement.

Without desiring to appear abrupt or short with our comments, but nevertheless realizing the need to be clear and unequivocal in our statement, we wish to inform this committee that our union finds nothing in S. 2153 as it relates to OSHA that warrants legislative action, despite its claim to improve the OSHA Act.

Proponents of the bill claim that it will substantially reduce or moderate political opposition to OSHA by confining the OSHA impact and confining the presence of OSHA only to a few workplaces where there are deaths and hazards of such severe nature that they cause serious injury.

This improvement factor, if you wish, even if it were achievable, relates not to the act or to its enforcement, but almost exclusively to a numerical narrowing of the critics by numerically excluding their workplace from the coverage of the act and its general, scheduled inspections.

However, the current OSHA enforcement authority would, except for the weakening of the penalties under this act, remain unaffected in the nonexempt workplaces. Certainly, we can anticipate—we have already heard from them—that the nonexempt employers will also seek to obtain appropriate "improvement" as previous testimony before this committee by the U.S. Chamber of Commerce has already indicated. Quite validly, we raise the question: "Improvements for whom?" Certainly not for workers.

Our point is that S. 2153 does not constitute an OSHA improvement merely because it excludes workplaces from general and in some cases, from accident inspections, and merely because it severely restricts workers' right to request a special inspection.

Whether there might be some improvement in the political climate as a result of the bill's passage, the committee—and the members have been here a very, very long time to judge those political winds—might well seek an indication of the answer from the experience so far developed under another regulatory agency designed to control work industrial hazards, namely, EPA, where the numerical range of the polluters being regulated under EPA is almost as narrow as the numerical range being contemplated by S. 2153.

It is our hope that the committee will differentiate between the political problems which arise from the present attack upon Government regulatory agencies and the OSHA-related problems, which OSHA-related problems result from specific enforcement strategies but which, because of the flexibility of the OSHA law, are amenable to administrative discretion.

Our union has been endeavoring to obtain maximum value from the OSHA presence in the workplace. However, there should be no misunderstanding that because we are pushing for greater effects under OSHA that we think the OSHA Act is substantially weak.

Rather, as an understanding of the workplace hazards and their abatement techniques evolve, so also should OSHA's enforcement strategies. The mix between inspection, consultation, education, is constantly changing. Most importantly, this committee should recognize that the Department of Labor, under Secretary Marshall and Assistant Secretary Eula Bingham, is also responding to these evolving developments. To stretch the dubious value of the Schweiker bill, it at the most would legislatively mandate only one particular inspection strategy, while it completely ignores all the current changes initiated by OSHA, which both make the need for legislative stimulation of administrative action to be totally unnecessary, and shows the legislative straightjacket envisioned by S. 2153 to be unrealistic.

So our main objection to this bill, Senator, is that it mandates a particular formula for targeting inspections. It is not so much the targeting, but it is rather the bill statutorily excludes workplaces from general OSHA inspections and in particular, undercuts the exempt employer's obligation to comply with regulations.

It is one thing to claim, as some of the sponsors for S. 2153 do, that no employer is exempt from the OSHA law or from the duty to provide a safe and healthful workplace. However, if there is, except in certain serious situations, a statutory prohibition against OSHA inspection of the workplaces in order to ascertain compliance, it is reasonable to assume that nonenforceable obligation to comply is no obligation at all. I guess that almost sums up everything that we might say in this statement, but perhaps I might switch over to some other parts of the summary statement.

One, the Schweiker bill is not a targeting bill. The sponsors of S. 2153 claim that the bill attempts to direct OSHA's inspectors into high-hazard areas. Yet it does not in any way enhance the regulatory authority in these hazardous worksites. Actually, it focus upon the exclusionary advantages of the nontargeted employers. Targeting systems, which OSHA and the States are now implementing, do not assure statutory protection against inspections for the nontargeted employers. As a matter of fact, the bill makes reference, or the sponsors make reference, to States that are engaged in targeting episodes, yet not one of those States in using targeting mechanisms concentrate or dwell upon the fact that there shall be nontargeted employers who are exempt from the general inspections. Yet this is what S. 2153 does. It extols the advantages of exemptions resulting not from the fact that the workplace is free of safety hazards, but that by happenstance, it has accumulated less serious injuries than a prescribed number of such injuries.

The emphasis of the bill is upon providing exemptions from most inspections, for most employers, on the supposition that this will alleviate political opposition to the bill.

Two, the Schweiker mechanism for exemption hamstrings effective targeting. We indicate here that the available statistics are not satisfactory for using this for the purpose of targeting. Even the State of Michigan was upset and testified that it would restrict their targeting operations. The State of California, which uses this mechanism, was amazed—"dismayed", I think, was the word they used—that you would legislate in this area.

Three, lost workday records are in an extreme state of disarray. And you have heard all this already, but I could summarize the fact that, for instance, in our State of Pennsylvania, no worker is entitled to workmen's compensation until after he has achieved the 14th day of that time. Then they go back and pick up the original days of lost work. How in the world can that record in the State of Pennsylvania reveal whether there has been an injury that involved lost time of either 1 or 2 lost workdays, where there is no reason at all to report such an injury? And of course, we are all aware of the fact that in our plants, many of our members go on sick and accident benefits, go on reserved work, and therefore, do not show up at all in the lost workday records.

Another item that I should mention is No. 5 in the summary, which states that nonserious citations do not relate to insignificant violations of insignificant standards.

Probably the greatest complaint our union has against the promoters of S. 2153 is the contention that they make, that only "two out of every three OSHA inspections find no serious hazards, resulting in a scattershot approach." Actually, two-thirds of all inspections result in citations, about one-third of which are for "other-than-serious" violations. Admittedly, a dictionary definition of those terms would indicate a situation of no great significance.

However, Mr. Chairman, those words have a legal definition that the authors of the bill ignore or fail to recognize. This committee itself emphasized the significance of the "nonserious" citations. In a report dated November 1974, the committee said this:

> The definition of a serious violation in the laws allows that not all hazardous situations that result in serious injuries can be cited as serious violations, due to the employer knowledge factor. Therefore, one must consider that the number of serious

violations cited may understate the number of serious hazardous situations identified."

I appeal to this committee as the knowledgeable legislative committee with OSHA jurisdiction to decry this gross misinterpretation of these statistics. Hopefully, if a scalp count of citations or some form of quota system is being used to evaluate the effectiveness of inspections, we will at least have a more objective measurement, since these do represent significant violations, even though we use the term "other-than-serious." A serious citation requires the presence of a hazard where there is first the "substantial probability" that death or serious physical harm could occur and that the employer had previous knowledge of the existence of the violation. That is a rigid test, maybe justifiably so because the serious citation carries with it a mandatory penalty.

But the absence of any of those conditions does not mean that the hazard is not a serious one. It certainly does not mean that the inspections which result in such citations are wasteful ones.

If the case, then, for S. 2153 rests upon this kind of data, our union hopes that you would reject its proposal.

Another item that I should mention is that voluntary safety activities will be seriously curtailed by the Schweiker bill.

Contrary to the contentions of the promoters of S. 2153, there are at least four aspects of the bill which will impair voluntary compliance:

One, the foreknowledge that a workplace will be exempt from general schedule inspection. There is no need to comply until a year after a number of serious injuries have occurred;

Two, the limitation on the worker's right to seek a special inspection;

Three, the restriction of the scope of allowable complaint inspections of qualified employers' establishments;

Four, the elimination or the lessening of penalties where there are plant safety committees;

Five, the elimination of plant safety committees' records as evidence of willful violations;

Six, The enticement to gerrymander a workplace to avoid inspection as permitted under the definition of "workplace."

There is no doubt that S. 2153 does indeed restrict workers' right to request a special inspection. Polemic material, defending the provisions of S. 2153, indicates that "the bill preserves OSHA's protections for all workers by specifically permitting inspections in all workplaces to resolve employee complaints."

On the contrary, the bill requires OSHA, and by inference, workers, to first notify employers that the complaint regarding hazardous conditions has been lodged with the agency. This forewarning can give the employees, certainly in an unorganized plant, pause because of fear of retaliation.

More importantly, OSHA will be barred from entry unless the employer fails to give satisfactory assurance that the violation has been corrected. Most employers will resist inspection, allege no violation, and/or claim adequate abatement. The Schweiker bill puts the employer in a privileged position, since OSHA would have the burden of disproving the employer's contention.

Presently under the act, section 8 inspection entries do not place any condition upon the inspection. The Schweiker bill provides a very substantial barrier to entry. The discretion to inspect shifts from OSHA to the employer.

Mr. Chairman, I know that there is much more in our statement, and I think at this point, it would be more advisable if I stopped reading it. We certainly appreciate the fact that these hearings are taking place. We appreciate the fact that we have been able to come here, as you see, with a certain degree of numbers, and we hope that our effort, together with the efforts of many throughout the country, will indicate to this committee that this bill is not one that should be legislated.

Thank you.

[The prepared and summary statement of Mr. Sheehan follows:]

TESTIMONY

by

JOHN J. SHEEHAN, LEGISLATIVE DIRECTOR
UNITED STEELWORKERS OF AMERICA

before the

COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

April 16, 1980

Without desiring to appear abrupt or short with our comments but, nevertheless, realizing the need to be clear and unequivocal in our statement, we wish to inform the Committee that our union finds nothing in S- 2153, as it relates to OSHA, that warrants legislative action despite its claim to represent an improvement over the 1970 Act. Proponents of the bill claim that it will substantially reduce or moderate political opposition to OSHA by confining its impact or presence to only a very few workplaces where there are deaths or hazards of such severe nature that they cause serious injuries. This "improvement factor," even if achievable, relates not to the Act and its enforcement but almost exclusively to a numerical narrowing of the critics by numerically excluding their workplaces from coverage. However, the current OSHA enforcement authority would, except for the weakening of penalties, remain unaffected in the non-exempt workplaces. Certainly, we can anticipate that non-exempt employers would also seek to obtain appropriate "improvements," as previous testimony before this Committee by the U. S. Chamber of Commerce has already indicated. Quite validly we raise the question: "improvements for whom?" Certainly not for workers!

Our point is that S - 2153 does not constitute an OSHA improvement merely because it excludes workplaces from general and, in some cases, accident inspections and severely restricts workers' right to an inspection. Whether there might be an improvement in the political climate as a result of the bill's passage, the Committee might seek an indication of an answer from the experience so far developed under another regulatory agency designed to control industrial hazards, namely EPA, where the numerical range of industrial polluters being regulated is as narrow as that being advocated by S - 2153. It is our hope that the Committee will differentiate between the political problems which arise from the present attack upon governmental regulatory agencies and the OSHA related problems which result from specific enforcement strategies but which, because of the flexibility in the OSHA law, are amenable to administrative discretionary action. Our union has been endeavoring to obtain maximum value from the OSHA presence in the workplace. However, there should be no misunderstanding that we feel the Act to be substantively weak. Rather as an understanding of workplace hazards and their abatement techniques evolve so also should OSHA's enforcement strategies. The mix between inspection, consultation and education is constantly changing. Most importantly, this Committee should recognize that the Department of Labor, under Secretary Ray Marshall and Assistant Secretary Eula Bingham, is also responding to these developments. To stretch the dubious value of the Schweiker bill, it, at the most, would legislatively mandate only one particular inspection strategy while it completely ignores all the current changes initiated by OSHA which both make the need for legislative stimulation of administrative action to be totally unnecessary and show the legislative straightjacket envisioned by S - 2153 to be unrealistic.

Main Objection

However, our main objection to S - 2153 is not that it mandates a particular formula for targeting inspections. Rather the bill statutorily excludes workplaces from general OSHA inspections and, in effect, undercuts the exempt employer's obligation to comply with safety regulations. It is one thing to claim, as some of the sponsors of S - 2153 do, that no employer is exempt from the OSHA law or from the duty to provide a safe workplace. However, if there is, except in certain serious situations, a statutory prohibition against OSHA inspection of workplaces in order to ascertain compliance, it is reasonable to assume the non-enforceable obligation to comply is no obligation at all.

Targeting or Exemption

Much has been said that S. 2153 merely targets OSHA's programmed inspections[*] but does not reduce the number of them. Mr. Chairman, the bill does more than that. It exempts by statute 90% of workplaces from such inspections. That is the main issue against which we raise our voices. Aside from the very serious defects in the targeting formula mandated by the bill, the fundamental objection is the bill's advocacy of exclusions.

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[*] The terms "programmed inspections," "general inspections" and "general schedule inspections" are used interchangeably.

Ever since OSHA came into being there have been continuous efforts to exclude certain workplaces from OSHA inspections -- despite the fact that no safety professional organization has so recommended. There have been three phases to this exclusionary movement. At first the proposal was made that small workplaces are by the very fact of their smallness safe workplaces. Statistics belie the contention and there was a basic repugnance to the concept that a worker's safety or health, because he was employed in a small establishment, was of less value than of one in a larger workplace.[1]

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[1] It is worth noting that in 1977 the House Committee on Small Business conducted hearings on the impact of OSHA upon small businesses. That committee concluded that there should be no exclusion of small businesses.

> "Dr. Bingham testified that OSHA would be devoting greater compliance resources to high risk industries. BLS statistics show that 20 percent of all small businesses are in high risk occupations (construction, manufacturing, transportation and agriculture), while 40 percent of large businesses are in those higher risk industries. They also show that the highest incidence of accidents occurs among firms of between 100 and 249 employees.
>
> "The practical effect of this shift in priorities is a shift in compliance activity away from small business to larger business. Inspection frequencies of lower risk small businesses (retail, wholesale, services and finance) will drop from 1 in 500 to 1 in 1,300, according to OSHA.
>
> "In terms of 'getting OSHA off the backs of small business," the shift in priorities accomplishes, in a constructive manner, what exemptions proposed to do in a negative manner. Low risk Main Street businesses (groceries,

Consequently we witnessed in the second phase the promotion of the proposal that a small and safe workplace should be excluded. This was the Church-Schweiker "rider" to last year's HEW-Labor Appropriations bill. Congress concurred despite the fact that the formula, which might indicate "unsafe" industrial categories of workplaces, was incapable of identifying "safe" specific (establishment-level) workplaces. The basic assumption of any of these forumlations, based upon injury-oriented data, is that an accident-free environment is a safe environment.

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hardware stores, wholesalers, banks) will see OSHA one-half to one-third as much, if this shift in priorities is actually implemented.

"As a result, this combined community of low risk small businesses in a city of 40,000 to 50,000 population, could expect only one OSHA inspection per year."

The third and present form of the exclusionary proposal is that any workplace, regardless of size, which is safe according to a legislatively prescribed formula, should be exempt from inspection. S-2153, the so-called Schweiker bill, although it has other cosponsors, is therefore a linear descendant from the Church-Schweiker "rider" which attempted to use statistical data to define a safe workplace. The major similarities are that the bills:

---- exclude workplaces from general programmed inspections,

---- assume that an accident-free environment is a safe workplace, and

---- rely upon injury data to be an indicator of an unsafe workplace, thereby being an "after-the-fact" indicator.

The Church-Schweiker rider and the Schweiker bill do have differences:

1) The rider was limited to workplaces of ten (10) or less employees. The bill applies to all workplaces regardless of size.

2) The rider used industry-level BLS injury and illness incidence-rate data. The bill uses establishment-level lost workday data supplied by state workers' compensation inquiries or employer affidavits.

3) The rider placed no restrictions upon workers' right to seek a special inspection. The bill prohibits such inspections if employer gives "satisfactory assurances" that the violation has been corrected.

4) The rider specifically allowed OSHA response to worker discrimination complaints (Sec. 11 (c)). The bill does not provide a similar protection for the aggrieved worker.

The third phase of these exclusionary proposals appears to have gained wider acceptance than its predecessors primarily because of a change in the rhetorical presentation. The previous versions emphasized exemption of workplaces and defended exemptions for their own sake. S-2153 attempts to change the dialogue from a debate on exemptions to a discussion of targeting or prioritizing inspections. Targeting of inspections and allocation of a scarce inspection staff to high hazard workplaces are desirable. It has been going on. The programming of inspections is constantly being perfected. S-2153 has merely adopted a system, parts of which are being used by eight states and which has already been the subject of an OSHA study. However, no matter how refined and establishment-specific have been the targeting systems none of these systems announces the automatic exclusion from the possibility of inspection of the nontargeted workplaces.

In comments before this Committee with President McBride, Senator Schweiker stated:

> "Well, let me say that I do not think anyone should be exempt from an inspection; I concur with that. I think the testimony makes clear that unless you have an enforcement procedure tie-in with any program, it will not work, so I concur with that."

Our Union is not opposed to an inspection targeting system, although we think it unwise and, given the present degree of responsive concern by OSHA with targeting systems, unnecessary to legislate any particular system. However, we do object strongly to the elimination of regular inspections or, if you wish, of an "enforcement procedure tie-in."

S-2153 confuses targeting of inspections with exemption of workplaces by using a particular inspection targeting system to exempt workplaces from general schedule inspections. The bill, thereby, negates one of the principle functions of the 1970 Act -- namely, to be preventive in its influence. Indeed, its inspection activity can have a profound impact in those places which are inspected. But the influence is much more expansive. There is a ripple-out effect. This is the benefit derived from not just inspecting a particular workplace but from the realization by other firms that their workplaces can be inspected. This "leaveraging" concept or preventive aspect of OSHA would be almost eliminated by S-2153. OSHA would be converted into an agency which investigates only after-the-fact situations in which injuries have already occurred in the previous year.

Lost Workday Data

Even if an inspection targeting system could legitimately be used both to prioritize inspections and to exclude workplaces from general inspection coverage, how valid is the system advocated by S-2153? The Schweiker bill declares a workplace to be unsafe if it has a certain amount of injuries which involve reported lost workdays. The assumption is that only those workplaces where there is a record of serious injury should be subjected to a general schedule inspection. Note that a hazardous workplace is defined as one in which there were previous lost workday injuries. The concept of "hazard" under the Schweiker bill does not include accidents; e.g., fire or explosions, which do not result in any injury nor injuries which fall short of being serious.

(a) The state workers' compensation agency, according to one option under the bill, is relied upon to reveal whether a plant has had at least one injury resulting in two days or more of lost work. It is already evident that no such data exist at the state level. These state agencies are established to pay compensation for certain injuries, not collect data on all occupational injuries and illnesses. The duration of the lost-time injury which is compensable varies from state to state. Thus, for instance, in Pennsylvania, a worker must first be out of work for fourteen days in order to pick up coverage for the first seven days. Therefore, many lost workday accidents are not reported. Therefore, in this case, the objective of the bill cannot be reached; namely, an identification of an unsafe workplace where there is at least a two-day lost-time accident. Actually, in such cases when there is a legitimate reason for failing to report, the workplace will be designated as "safe" or exempt when actually under the bill it should not qualify for an exemption. Of course, an employer need not report such injuries if the injured worker is compensated directly by the employer. The incentive to avoid OSHA inspection will be very strong so that such compensation records will be meaningless to identify unsafe workplaces.

Furthermore, the use of a "workplace" as the unit for designation really confuses the situation. Some state records are employer-specific and not plant-specific. Additionally, many states indicate that their files are confidential and, hence, not available for use in inspection targeting.

(b) Under another option an employer could apply for exemption by submitting an affidavit that he had fewer than an allowable number of lost workday injuries resulting in one or more lost workdays. The reason for the second exemption trigger is certainly open to speculation. It is obvious that the first trigger does -- even though in an incomplete manner -- indicate "unsafe" workplaces. The second trigger does not follow the same intent, namely a designation of an "unsafe" workplace. Actually it is an employer-oriented affidavit system whereby he declares that he is not an unsafe employer. Presumably the author of the legislation and the Committee staff realized the deficiencies in the state compensation agency reporting system.

The second system allows more employers to seek exclusion from scheduled safety inspections than the agency system even if it were more complete. Why is this so? The second option permits an employer to have a specific number of disabling and serious injuries without his workplace being scheduled for a possible inspection.

Aside from the confusion that an injury under this option is defined as one which results in only one or more lost workdays, it allows an accumulation of injuries before an unsafe "threshold" is reached. The rate is two injuries per 100 workers. Thus, in a plant of 1000 employees, 19 disabling injuries are discounted. There is no evaluation of the fact that these injuries may have varying duration of time lost and varying degrees of severity. Thus, for instance, there could be a situation in which a number of workers suffer severe burns from an explosion or fire and there were a number of amputations (up to 19), but the plant could still validly be declared "safe" through the employer affidavit system.

Additionally because of the definition of workplace and reference to "average number of full-time employees (or their equivalent)" the workplace and the work force could be subjected to gerrymandering tactics to avoid inspections.

Again, Mr. Chairman, while a more detailed evaluation of this two-option inspection targeting mechanism will indicate that it should not be the exclusive method 2/ for prioritizing inspections into unsafe workplaces, it definitely cannot be used as a means for identifying safe workplaces for the purpose of excluding them from general schedule inspections.

2/ According to an analysis of the bill by the Michigan Department of Labor which administers a Section 18(b) state plan: "The Schweiker-Williams bill represents a major step away from meeting this objective [I.e., to provide all employees with hazard-free work places]." In detailing its opposition to the passage of S. 2153, MIOSH critized the targeting mechanism:

> "In contrast, Michigan uses a variety of factors, such as the occurrence of permanent impairment injuries, the size of the workplace, the previous inspection history of the employer, the number and type of lost workday injuries, and other criteria for the establishment of inspection priorities. This system has been highly successful in view of Michigan's declining injury rates in recent years.
>
> "It is readily apparent that the exemption criteria contained in the bill is not adequate to accurately specify which workplaces should or should not be inspected. The development of such criteria is an administrative responsibility and should not be dictated by legislation. By writing inspection priorities into law, the bill will greatly reduce both the flexibility and effectiveness of MIOSHA and OSHA enforcement programs."

Nonserious Citations

OSHA already has indicated that it is targeting inspections; that 95 per cent of its general inspections are directed at high-hazard workplaces; that it has trimmed its response to workers' requests for special inspections. Nevertheless, S-2153 appears to want to legislatively duplicate, albeit in an arbitrary fashion, what is already being done administratively.

In order to justify a legislative action the Schweiker bill places great emphasis upon directing inspections at serious hazards and decries the fact that current OSHA inspections result in citations for serious violations in only 1/3 of the cases. OSHA officials have indicated that the ratio is higher when follow-up inspections are deleted from the calculations. However, the bill does not give adequate attention to the fact that nonserious violations constitute at least another third of the citations. Somehow these citations are considered to be "insignificant" because they are designated as "other than serious" or "nonserious." This simply is not so. These situations involve hazardous conditions which are detrimental to a worker's safety. The OSHA inspection manual states that an inspector can cite a situation as serious only if --

---- there is a substantial probability that death or serious physical harm could result, and

---- there is knowledge by the employer of the presence of the violation.

Without attempting to give a legal interpretation of the various aspects of this decision, it should be sufficient to indicate that if, in the judgment of the compliance officer, all the conditions are not present he will not issue a serious citation. He will issue a nonserious citation. The point to be made is that such a citation is not therefore related to an insignificant hazard. Perhaps if that realization were better appreciated then the excessive criticism of the present inspection system might be abated. Certainly, high-hazard conditions should be inspected but not every citation of discovered violations will be considered to be legally serious ones. Nevertheless, nonserious citations are necessary to prevent serious injuries. The fact that there are a third such citations does not mean that the inspection was a "wasteful" one.

As a matter of fact, Mr. Chairman, S-2153 in its cavalier dismissal of the significance of other-than-serious citations represents a pronounced reversal from the position which this very Committee took on this issue when it released a series of findings on September 5, 1974, under your signature. The report -- far from discounting these other-than-serious citations and urging a redirection away from such workplaces when there was a prevalence of such citations -- actually charged OSHA to reassess the citation procedure. The focus which this Committee urged was not upon the downgrading of the inspections but rather upon the upgrading of the citations. At that time the Committee was concerned that certain factors tended to cause inspectors to devaluate the seriousness of the violations.

> "Another dimension of the serious/non-serious citation paradox concerns the attitudes and practices of the individual compliance officers. Interviews with inspectors have revealed a tendency to classify citations as non-serious violations which could have been otherwise cited as serious. The inspectors indicate that the reason why this is done is because of the extensive amount of time and effort it takes to document a serious citation. They have exhibited such hesitation in the belief that a serious citation with a large penalty would most likely be litigated, and cause additional drain on their time. Inspectors further expressed a feeling the Review Commission has placed a greater burden on the Department to prove its case when a serious violation is involved, and that they probably won't be able to meet the evidence requirements demanded, with the result that the case will be dismissed. Some inspectors rationalized that citing an otherwise serious violation as non-serious is a necessary expedient despite the fact that they were not enforcing the law to the fullest extent possible."

In view of these realities it does seem somewhat disingenious to argue that inspections resulting in nonserious violations "allows a scattershot approach that bogs down inspectors in safe places and clogs up the system so that the inspectors don't get around to the more dangerous workplaces."

The report further emphasized the significance of non-serious violations whether downgrading was occurring. That emphasis cannot be ignored by some newfound evaluation that such inspections represent a mismanagement of an enforcement strategy. The Report stated:

> "The .... definition of a serious violation in the law allows that not all hazardous situations that would result in serious injuries can be cited as serious violations, due to the employer knowledge factor. Therefore, one must consider that the number of serious violations cited may understate the number of serious hazardous situations identified, and, conversely, the total non-serious violations cited may include some situations identified as likely to result in death or serious physical harm. It is not known how many non-serious violations represent situations which would have been cited as serious had there been employer knowledge."

Complaint Inspections

I believe we should be very clear that S-2153 severely restricts workers' access to the rights which they now have under Section 8(f) of the Act, namely the ability to obtain a special inspection of their workplaces when they believe a violation of a safety standard exists that threatens physical harm or that an imminent danger exists. In the scheme of the bill it was necessary to restrict this right so that the exemption provisions could have effective meaning. Otherwise exercise of current rights could be viewed as a loophole to the exemption sections. While this may be a legitimate concern for those interested in exemption from inspection, it is not correct to state that S-2153 "continues the requirement in existing law for a complaint inspection if OSHA believes the problem is not corrected."

There is no such limitation either in the 1970 Act or in S-2153. The OSHAct gives the Secretary of Labor the discretion not to respond to the complaint if he determines there are no reasonable grounds to believe the violation or danger exists. The question is not whether a condition has been corrected but whether a hazardous condition exists.

S-2153 does, however, have a damaging limitation on the Secretary's obligation to respond. He must determine whether the employer "has failed to provide to /him/ satisfactory assurances that appropriate action, if any, has been taken to correct the violation." The burden is upon the Secretary to disprove the "satisfactory assurances." We have no doubt that this provision will be an effective barrier to the exercise of the Secretary's obligation to respond. It will be the death-knell to the workers' right to request an inspection.

It is entirely erroneous to refer to the GAO recommendation as the basis for S-2153's version of the complaint provision. At least GAO left it to the discretion of OSHA as to whether it should respond by OSHA itself making a determination that the complaint involved death or serious physical harm. S-2153 allows the employer to interpose a condition, whereas the GAO prescribes a discretionary decision by OSHA. Furthermore, the GAO recommendations also direct OSHA to inspect for "other potentially serious work site hazards -- during complaint inspections." S-2153, while allowing the Secretary the discretion to cite for other safety violations, explicitly states that complaint inspections "shall be limited to the purpose of such inspection." There is no way that we can maintain that S-2153 does not take away the rights of workers to safety inspections in response to complaints.

It should be noted that the GAO report also fails to give due recognition of the significance of nonserious citations and the fact that other serious violations were found during the inspection. In evaluating the effectiveness of complaint inspections according to a citation or scalp count, the GAO data could also indicate that a higher degree of hazardous situations were discovered.

However, Deputy Assistant Secretary of Labor Basil Whiting noted that there was a more basic value to these inspections.

> "When we start talking about formal complaints, we are dealing with a conflict of desirable goods. It is desirable to save resources by concentrating only on the serious situations, even in formal complaints. On the other hand, the statutory scheme here establishes as a right of a worker who feels he is faced with a hazard to have a governmental response to check and determine whether that hazard indeed exists.
>
> "At present, the interpretations of the formal complaint mechanism are that we must respond; the Act says 'shall.' On the other hand, there are some arguments made by some of those who have reviewed this history that perhaps there is some degree of flexibility there that has not been taken care of.
>
> "We would like, through administrative discretion, to go through a year or so of this informal experience and to refine it and hone it, and then assess the degree to which it could be applied effectively, or should be applied effectively, to the formal complaint situation, and consult with this Committee at that time.
>
> "But when you are dealing with modifying the formal complaint mechanism, you are dealing with a fundamental right that workers now feel very strongly about; indeed, it has been called an addition to the Bill of Rights in some quarters. That should be dealt with very, very carefully."

This deeper value of the complaint inspection right cannot be overevaluated in terms of voluntary compliance through the mechanism of labor-management safety committees. The continued existence of the 1970 Act's version of this right is somewhat analogous to the preventive aspect of the nonexemption of employers from general schedule inspections. As indicated above, the nonrestricted scope of the general inspections act as a leverage for safety compliance in noninspected plants. So also does the access to Section 8 (f) complaint inspections act as a leverage to a more responsive management dialogue with plant level safety committees. S-2153 lessens the leverage by shrinking the fulcrum potential of Section 8 (f) in exempt workshops where, it could be argued, because they are exempt from general schedule inspections, there is the need for a higher fulcrum.

Neither the GAO nor the BLS is able statistically to measure the true impact of the complaint inspections. Many workplaces produce voluntary compliance as a result of this right. Despite the fact that the author of S-2153 claims the bill is designed to "encourage cooperative safety programs .... and to increase worker involvement in improving safety," the retrenchment of the Section 8 (f) right will have a direct opposite negative impact. A recent study on "The Effectiveness of Union-Management Safety and Health Committees" by the W.E. Upjohn Institute for Employment Research credited this provision with the immeasurable impact not captured by the GAO report and totally ignored by S-2153.

> "The analysis showed quite clearly that OSHA is affecting the behavior of union and management representatives at the plant level. Furthermore, the functions carried out under the act and those effected by the union-management safety committees supplement each other rather than overlap. OSHA pressure was found to be one of the most important forces producing major safety changes, such as investments in new safety equipment. The committees, on the other hand, tend to deal more with the day-to-day monitoring of safety and health conditions in the plants. The only area where the law and the committees seem to be overlapping directly is on the issue of improving machine guarding.

> "The unions in these plants have definitely used OSHA as a source of leverage or pressure to be relied upon when faced with a recalcitrant management. The main effect of the presence of the law and the threat of its enforcement has been to increase the commitment of management to deal with safety and health issues and specifically to reduce its resistance to union efforts at improving safety and health conditions. Thus, in addition to a direct impact through its standards and its enforcement program, OSHA has had an indirect impact by increasing the influence of the union in inducing management to make changes and to monitor safety and health conditions in the plant.
>
> "Evidence was also found which suggests that the presence of an active union-management committee and especially the existence of a high level of problem solving within such a committee are associated with a low issuance of citations following an OSHA inspection of the plant. Thus, to some extent, there is indication that successful committees can act as a means of insuring the enforcement of the act during periods between inspections, thereby increasing the continuity of the law's impact."

Penalties

A word should be made in passing about the claim of S-2153 that it would stimulate the establishment of plant safety committees through the provision which would eliminate or, in some circumstances, lessen the penalties for violations of safety standards if the violating employer had such a committee in place prior to the violation. That is a fairly gratuitous statement and in some cases workers might think that they are being used and might abandon such committees if they perceived them to be merely buffers against legitimate penalties for safety violations.

If indeed the avoidance of a penalty might act as a stimulant to the creation of these committees, then OSHA should promulgate a standard requiring committees under certain circumstances and subject compliance to that standard to a penalty for its violations.

Conclusion

There are other smaller details in the bill to which we object and about which you will be hearing comments. Our union opposes S-2153 primarily because it --

- exempts workplaces from general schedule inspections,
- eliminates the preventive mission of OSHA by restricting inspections to workplaces where there is an after-the-fact compilation of serious injuries,
- relies upon an exclusive inspection targeting system which limits the flexibility of OSHA to pursue more realistic mechanism,
- legislates a specific-detail administrative program which more properly should be left to administrative discretion,
- legislates a specific-detail administrative program despite the fact that there has been administrative responsiveness to the problems of targeting inspections,
- restricts the right of workers to seek a specific inspection,
- eliminates or lessens the already moderate penalty schedules for violations of safety standards,
- changes the OSHA definition of injury to one involving only lost-time cases and thereby reverts back to the pre-OSHA period,
- assures a degree of paper work which will drastically inhibit the effective functioning of OSHA,
- represents a withdrawal of the federal commitment to assure safe and healthful working conditions, and
- does not improve the 1970 Act.

Our Union would recommend, however, that the Committee continue the evaluation of the various targeting systems. If, indeed, the Committee finds value to the current OSHA experimentation in this area, it might request that demonstrative projects by OSHA evaluate the merits of the various systems and report back to the Committee so that there will be greater public understanding in Congress and by employers of the enforcement strategy being pursued by OSHA. Positive progress can result from a more prolonged and comprehensive oversight of OSHA's programs without the need to have recourse to legislative amendments. We would hope the Committee will view the Church-Schweiker rider and the Schweiker bill as legislative proposals designed to exempt workplaces and resist their enactment either as amendments to the 1970 Act or as riders to the appropriations bill. We depend, as we always have in the past, upon the articulate and effective spokesmanship of this Committee. That voice is needed now to resist encroachment upon the federal responsibility to maintain effective social regulatory authority. Senator Ribicoff, in releasing an MIT report on the achievements of health, safety and environmental regulations, stated that the report "is a reminder that regulation does more than cost money: It saves lives, avoids injuries and protects the public against marketplace failures."

Mr. Chairman, OSHA saves lives.

Thank you.

APPENDIX I

PROBLEM OF USING WORKERS' COMPENSATION DATA

The proposed legislation provides two ways in which a workplace might qualify for exemption. The first basis for exemption would be if a workplace did not appear on a list prepared by a state agency listing all workplaces which had one or more occupational injuries of two or more lost workdays as reported under a state's workers' compensation system. While the bill is not clear, it appears that the decision of whether or not to prepare such a list would be left to the individual state.

Many state reporting systems could not generate the required information. The bill provides $5 million per year until 1985 to assist the states in producing this information. However, there is no indication that this amount would adequately cover the additional costs. (Furthermore, these funds could be put to better use in providing added personnel for additional inspections or consultation and education programs.)

There are numerous procedural problems associated with using the workers' compensation material. Even if they care to, there are a number of states (reportedly 6) which by state law would be prohibited from releasing or publishing a list as required by the bill. Thus, workplaces in these states would not be allowed to qualify on the basis of the first test.

The Department of Labor's Office of Workers' Compensation Programs performed a telephone survey in September 1979. This survey covers the states reporting requirements but the survey did not adequately reflect what is actually being reported at this time. Nevertheless, the summary of the study stated: "Although 43 states do capture at least some injury/illness characteristics information, reporting procedures among the states vary to the extent that any real uniformity in data is difficult to obtain." One primary problem with using compensation data is that there is a noncomparability of the concept of a lost workday under the workers' compensation systems and lost workday cases as defined by OSHA. (It is true that several states with state OSHA plans do use workers' compensation data, but there are questions as to the validity of the data as an exclusive test for inspection.)

In telephone conversations with state compensation directors, it became obvious that Workers' Compensation statistics could not be used as the basis of exemption. Too many cases which should be reported under the law are not being reported to allow this as a basis of exemption from inspection.

For example, in Pennsylvania, even though all lost workday cases are supposed to be reported, in fact, many lost workday cases are not reported. An injured worker must be out 14 days in order to pick up coverage for the first 7 days (as per attached sheet). If a worker is out less than 14 days, there is no basis for a lost time claim for the first 7 days. Therefore, despite the law, many lost workday cases of 2, 3, 4, etc., days are not reported. How many is not known, but it is probably large since accidents which disable for less than 7 days would appear to be the bulk of the cases.

A Michigan report stated: "Michigan employers report only those compensable cases with seven or more lost workdays. The reporting of cases with two or more lost workdays would result in a three to fourfold increase in the number of cases now being submitted. This will place a large recordkeeping burden on both the employers who must prepare the report and the state agency that must process them."

Under Workers' Compensation the concern is with compensation. If an injured worker receives equal or greater benefits under a Sickness & Accident plan or is transferred to another job, the bureau may never receive a notice of a claim. (See attached sheet for the Pennsylvania definition of disability.)

In addition, many experienced labor people tell stories of workers who have had their days off rescheduled, so that the recovery from an injury would not be on scheduled workdays (for example, in a 7-day operation the two days off for the two workweeks could be scheduled back-to-back so there would be four consecutive days off). Other people have told of workers being coerced into using vacation time off to recover from work-related injuries. In both these cases, there would be no disability claim under the Pennsylvania definition.

Many states cannot at this time provide the required data. Illinois, a major industrial state, and Louisiana store the reports in cardboard boxes with no statistical record of the information in the reports. Illinois will be computerizing its records, but it will be 3 years before the information has been computerized for a full year and can be used to provide a list of exempt workplaces.

At this time New Jersey does not keep files by employers' names. The files are now kept by the Social Security number of the injured worker. The information was on computer, but it apparently is not being done so at this time.

Ohio has a computerized system, but the state in many cases cannot break out individual workplaces or plants. For example, General Motors is code #2 for the entire state. How long it would take to modify the system once a "workplace" is defined is not known. Ohio has similar coverage as Pennsylvania for the first 7 days of disability. Many of the larger employers, especially the self-insured, provide better benefits under Sickness & Accident plans, so many cases paid for under S&A benefits are not reported. In addition, the Director advised that if the law was passed he would be in the "nice" position of having a federal law which provides for the disclosure of certain compensation information and a state law which prohibits him from releasing the information. Therefore, Ohio employers could not participate in the first exemption test.

From the above information it appears that many incidents which would be considered a lost workday under the OSHA concept would escape being reported under Workers' Compensation systems through either legal subtrefuge or a deliberate failure to file a report.

From these contacts it is obvious that state Workers' Compensation plan reports cannot be used to construct an accurate data base.

PROBLEM OF WORKPLACE DEFINITION AND ACCIDENT FREQUENCY

The second basis of exemption is an affidavit by the employer that the workplace had a lost workday injury rate below a specified level. Aside from the obvious potential for fraudulent filings, this concept has two problems. The first is the definition of a workplace; the bill is not clear on this. For reporting purposes and to derive a statistical profile, the Department of Labor has provided an establishment definition. This definition is similar to the workplace definition in the proposed bill. However, the 1970 Act, while applicable to "workplaces," did not include a definition of a workplace. Inspectors do not now have to contend with defining what constitutes a workplace. The Act is employer oriented rather than workplace oriented. The potential exists for much arguing and possible litigation over the definition of a workplace.

A large employer could choose to expand or contract the workplace by including or excluding parts of a plant. For example, the coke ovens of a steel mill might be included but an employer might attempt to exclude the fabricating section or vice versa, depending on which would serve to exempt the plant from inspection. Or if a mill could not qualify for exemption an employer could keep an inspector out of a separate engineering operation arguing that this was a separate workplace.

The second problem area is determining the accident frequency rate and the average employment of a plant. If certain "accidents" are overlooked or if the denominator (employment) were increased, an "unsafe" plant could qualify for exemption. Only the employer would have the records to show the average employment in the preceding year.

The Secretary of Labor would need to have access to the back-up records in order to verify the information submitted to justify an exemption from inspection. While the Secretary would be prohibited from inspecting an exempt premise, he could choose to examine the supporting records of all these workplaces -- a near impossible task.

NEED TO HAVE THE RIGHT TO INSPECT EVERY WORKPLACE

Basil Whiting, in his testimony before the Senate Labor and Human Resources Committee oversight hearings on OSHA, stated that there was a "ripple effect" from inspections. (Page 11). This is the benefit from not just inspecting that particular workplace but from the realization by other firms that their workplaces can be inspected. This is also known as the concept of "leveraging". The benefit is not just from inspecting a particular workplace, but also that the possibility of other workplaces being inspected encourages compliance from many other firms.

In hearings before NACOSH (the National Advisory Committee on Occupational Safety and Health) concern was voiced about standards which would exempt certain workplaces from the possibility of inspection. John Brooks of North Carolina indicated in his testimony (Page 109) that if there were zero inspections of certain workplaces we could forget about "voluntary" compliance for these workplaces. He stated: "If it's a zero and it's known to be a zero rate, forget compliance on a voluntary basis by those people, ever how small and what their low experience rate may be. To protect those employees that the program does nevertheless cover in those low instant (incidence sic) small businesses, it is still necessary that there be random selection, on inspection on a regular systematic basis of all of them. Otherwise, it's that income tax audit that still has to occur in that sector or you do not get compliance."

ARE THE EXEMPT WORKPLACES REALLY SAFE

Implicit in the bill is the assumption that the exempt workplaces are safe workplaces. Studies are being made to prove or disprove this assumption. Until the results are published, it is not correct to assume a workplace which qualified for exemption is a safe workplace.

Based on available statistics, the proposed bill will exempt approximately 90% of the workplaces from inspection. Since OSHA inspects only approximately 2% of all workplaces, it would mean that only one out of five of the non-exempt workplaces could be inspected -- that is, if the information were available in adequate time to generate the necessary lists. No proof has been presented to indicate that the exempt workplaces are safe. It may well be that a workplace that would qualify for exemption is an unsafe workplace that is waiting for an accident to happen -- an accident that could perhaps be avoided by a safety inspection.

The 90% workplace exemption fades rapidly when the same test is applied for more than one year. If the test were applied for two years, the number of workplaces drops to below 75% and if the test were applied for a three-year period, the 90% level drops to below 45%. This certainly is an indication that more than half of the so-called safe workplaces were merely lucky.

THE STATE SURVEY CONDUCTED BY THE COMMITTEE'S STAFF

The Office of Workers' Compensation Programs of the U. S. Department of Labor survey, discussed above, only covered the technical reporting requirements of the various state compensation acts. The survey failed to ask what is actually being reported. In an effort to clarify some of the questions raised as a result of this survey, the Senate Committee's Staff made an effort to conduct its own follow-up survey. This survey included the question of confidentiality and the questions of whether or not injury reports are mandatory and, if so, what sanctions exist, under law, for the failure to file a timely report. The survey, however, did not ask how may reports are not submitted as required by law, despite these sanctions and how often the sanctions are actually imposed.

The State of Washington uses Workers' Compensation reports to target state OSHA inspections. The State Directory indicated that he believed that most of the reports that should be filed by employers are being filed. However, a NIOSH study on reports filed in Washington and Oregon indicated that a number of reports which should have been filed actually were not filed.

The study included an assessment of injury records in small industries in Washington and Oregon. The report found that a large number of recordable injuries did not appear on the employer's log or in compensation files. Many of these were "serious" by definition.

The study, by Dr. David P. Discher of the University of Washington, stated in part:

> "Of the 1,005 occupationally incurred injuries, 42% were reported only on the medical questionnaire; 7% came from the Employer's Log only; 12% through Workmen's Compensation claims and 39% from more than one source, mainly, the Employer's Log and Workmen's Compensation claims."

So, despite the Staff's good intentions we really will not know what proportion of the reports required to be filed under the present State laws are actually being filed. If a great number are not reported, then many workplaces that should not qualify for exemption would be exempt from inspection.

ADMINISTRATIVE PROBLEMS CREATED BY THE PROPOSED BILL

While the OSHA agency is best qualified to present the problems of administering the Act as modified by the proposed bill, some comments are appropriate. The bill provides for an exemption from inspection for qualifying workplaces for a period running from April 1 to March 31. Not only would the state compensation lists and the employer's affidavits have to be filed before the deadline, but the agency would require an extensive clerical and technical force to check the accuracy of these forms. This check, though, could only consider the lost workday cases and employment figures. It would appear that an office staff would have no way of assessing the validity or accuracy of the statements made in the affidavits.

In addition, because of the limited workforce of inspectors, all firms not qualifying for exemption cannot be inspected in a single year. It is conceivable that a workplace could "bounce" on and off the exemption list over a number of years and escape inspection as either being exempt from inspection in a particular year or was one of the approximately 80% of non-exempt workplaces that OSHA could not get to that year for inspection.

Another problem situation that might arise would be in an area such as an industrial park. An OSHA inspector might be inspecting a non-exempt workplace and would see an unsafe situation on the other side of the fence but would be precluded from entering the premises for inspection, short of an imminent danger or serious hazard, because this second workplace was on the exempt list.

Coupled with the problems of defining and identifying safe workplaces and the use of incomplete workers' compensation data, the proposed bill is not a step towards deregulation and "big government" but rather will increase regulatory problems and red tape. If enacted, the bill will increase the government workforce in a way that will not help to protect American workers. Funds directed towards increased clerical help would be put to better use for education programs and more inspectors.

Although Pennsylvania's Workers' Compensation law requires reports to be filed in the following situations, many of the required reports are not filed. Reportable events are:

> "1. Report of occupational injury (or disease), regardless of disability or medical expense, must be submitted to your insurance carrier immediately.
>
> "2. Report of occupational injury (or disease) must be filed with the Department of Labor and Industry in the following cases:
>
> (a) within 48 hours for every injury resulting in death
>
> (b) not before 7 days but no later than 10 days after date of injury for all other injuries covered by the Workmen's Compensation Act, except
>
> THOSE CASES RESULTING IN NO DISABILITY"

For the purposes of the Act a disability is defined as follows:

> "Disability for the purposes of reporting to the Bureau shall be defined as (1) loss of time or wages beyond the day, shift, or turn in which the injury was received or (2) the loss or loss of use of a member or disfigurement which may qualify for a specific loss payment under Section 306(c) of the Act."

Under the reporting requirements of the Act OSHA's Form 200 defines an injury with a lost workday as follows: "Any injury which involves days away from work, or days of restricted work activity (emphasis added) or both, must be recorded since it always involves one or more of the criteria for recordability."

Thus, a lost workday case under OSHA might not be a "loss of time or wages" for compensation purposes.

Benefits are payable in Pennsylvania as follows:

> "Compensation (weekly disability) is not payable for the first 7 days of disability unless your disability lasts 14 days or more. After the 7-day waiting period, you are entitled to compensation benefits equal to 2/3 of your average weekly wage (wages should include those from all employers for whom you are currently working) subject to maximum and

minimum limits as provided by law. The first payment of compensation must begin no later than the 21st day after your employer knew of your injury. Once you return to your previous work at the same or greater wage, or your disability otherwise ceases, your claim for compensation may be reopened within 3 years from the date of your last payment of disability.

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April 16, 1980

STEELWORKERS OPPOSE S-2153

In testimony before the Senate Labor and Human Resources Committee, the United Steelworkers of America strenuously opposed S-2153, a bill designed to exempt allegedly "safe" workplaces from OSHA safety inspections. According to the testimony, the union opposes S-2153 primarily because it:

- exempts workplaces from general schedule OSHA inspections;
- eliminates OSHA's preventive mission by restricting inspections to workplaces where there is an after-the-fact compilation of serious injuries;
- relies upon an exclusive inspection targeting approach which limits OSHA's flexibility to pursue more realistic mechanisms;
- legislates in specific detail an administrative program which more properly should be left to administrative discretion;
- legislates in specific detail an administrative program despite the fact that there has been an administrative response to the problems of targeting inspections;
- restricts the right of workers to seek a specific inspection;
- eliminates or lessens the already moderate penalty schedules for violations of safety standards;

-over-

- changes the OSHA definition of injury to one involving only lost-time cases and thereby reverts back to the pre-OSHA period;
- assures a large amount of paper work which will drastically inhibit the effective functioning of OSHA;
- represents a withdrawal of the federal commitment to assure safe and healthful working conditions; and
- does not improve the 1970 Occupational Safety and Health Act.

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SUMMARY

TESTIMONY

by

JOHN J. SHEEHAN, LEGISLATIVE DIRECTOR
UNITED STEELWORKERS OF AMERICA

before the

COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

April 16, 1980

The "Occupational Safety and Health Improvements Act of 1980" (S-2153) does not improve the OSH Act. Actually it creates two classes of workplaces and, as a consequence, two degrees of worker protection. The first classification covering 90 percent of the worksites, comprises the "qualified" or exempt employers who can escape general schedule inspections, receive partial immunity from complaint inspections, and avoid penalties for safety violations disclosed during special inspections conducted under very limited conditions. The workers of the exempt employers suffer because they:

(a) lose the possibility of a general inspection;

(b) retain only a partial right to request and obtain a special inspection;

(c) submit their plant safety committee as a shield for the employer to avoid penalties;

(d) witness the downgrading of the safety committee's report so that it cannot be used as evidence of willful violation.

The second classification, concerning only 10 percent of the worksites, is composed of the non-exempt employers who are subject to all of the current provisions of the OSH Act, except that potential penalties for serious and other-than-serious violations may be diminished if there is a plant safety committee. The employees of such employers retain all of their rights and protection under the Act.

By no stretch of the imagination can this two-tier system be called an improvement. While OSHA's full enforcement activity remains unchanged where OSHA continues jurisdiction over the nonexempt employer, 90 percent of the workplaces are by statute granted exemption from OSHA's general inspection activity. This is not an improvement. It is an exclusion. Our basic and strong objection to the Schweiker bill is its exclusionary feature. No degree of protestation that the bill merely targets OSHA's meager inspection force into high hazard areas can hide the fact that the bill is nothing more than a vehicle for exempting worksites from OSHA's general inspection. In effect, the exemption from such inspection constitutes a *de facto* reprieve from the duty to comply with work safety standards. A *de jure* obligation to comply is meaningless unless there is an enforcement mechanism.

1. The Schweiker bill is not a targeting bill.

The sponsors of S-2153 claim that the bill attempts to direct OSHA inspectors into high hazard areas. Yet it does not in any way enhance the regulatory authority in these hazardous worksites. Actually it focuses upon the exclusionary advantages of the nontargeted employers. Targeting systems, which OSHA and the states are now implementing, do not assure statutory protection against inspection for the nontargeted employers. Yet this is what the Schweiker bill does. It extols the advantages of exemption resulting not from the fact that a workplace is free of safety hazards but that by happenstance it has accumulated less serious injuries than a prescribed number of such injuries.

The emphasis of the bill is upon providing exemptions from most inspections for most employers on the supposition that this will alleviate political opposition to the bill. Yet, Mr. Chairman, we can all attest to the fact that some employers, who are by all accounts clearly within well defined hazardous categories and who have had sustained serious citations issued against them, still have recourse to political pressure to restrict OSHA in their workplaces.

2. The Schweiker mechanism for exemption hamstrings effective targeting.

S-2153, which uses lost workday injuries for identifying unsafe workplaces, restricts OSHA's enforcement strategy. Professional safety expertise will contest the bill's total reliance upon only one method for determining worksites for scheduled inspections. There is no such tool available. Michigan State OSHA officials have insisted that "the development of such criteria is an administrative responsibility that should not be dictated by legislation."

At best we can only estimate through administrative discretion what are the areas -- let alone with finiteness the specific worksites -- of hazards. Even a past record of serious injuries at a particular plant will not be an indication that the hazard still exists or exists at the time of the inspection.

Targeting needs flexibility to be effective. S-2153 will seriously erode the conscious efforts already underway to devise realistic formulas for allocating a limited inspection staff.

On the other hand, exemption clauses need to be somewhat precise. Since the main focus of the bill is upon the exclusion of workplaces and not upon the realities of targeting techniques, the lost workday formula is as good as any short of a simple numerical test.

3. Lost workday data records are in an extreme state of disarray.

This Committee is now in receipt of information, although there has been previous knowledge by staff, that there is little uniformity among the states as to what constitutes a lost workday reporting requirement. State workers' compensation agencies are interested in such statistics only to the extent that compensation payments may be due. Hence not all lost time injuries will be reported. Thus, for example in Pennsylvania, no worker becomes eligible for such payments until the fourteenth

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day of disability. Hence many workers will not file for benefits unless they feel they might become eligible. If no compensation is due, either because there are not enough lost days to qualify, or because the worker is compensated by the employer through the plant sick and accident fund, or through assignment to another task without loss of pay, there are no records of any injury which under S-2153 would certainly designate such a workplace as unsafe.

Thus the state-derived lost workday data, as advocated by S-2153, will not only swell -- invalidly but not illegally -- the rolls of the qualified or exempt employer but defeat any real program for targeting.

If lost workday records are used, even though imprecise, in a flexible multifacet program for targeting inspections, then perhaps this weakness can be compensated. But to use this incomplete non-uniform data for the purpose of designating a worksite as safe and as exempt is highly irresponsible.

4. Lost workday data is an after-the-fact system of statistics.

Data collection has a value according to the reason for which it is gathered. Lost workday data, and from its compensation tie-in, is an after-the-fact indication that something failed at a worksite which resulted in the injuries. But OSHA inspections should not be confined to an after-the-fact, "ambulance chasing" inspection approach. Only 4 percent of OSHA's so-called accident inspections are devoted to this purpose. OSHA should be concerned about the existence of hazards, waiting for an accident to occur. The Schweiker bill would convert OSHA into an investigation agency rather than a preventive agency. That is why Lloyd McBride, USWA President, testified at the oversight hearing:

> "My concern is that /the designation of an unsafe place/ can become evident without the loss of life or without serious injury having to take place; that is not a reasonable test to see whether a hazard exists; that is an unreasonable test. If we have to wait until somebody is seriously injured or somebody is killed in order to establish a given workplace within a reasonably safe industry as being unsafe, that is a totally unreasonable approach to occupational safety . . . who should pay the price? Who should get killed? . . . It would be an injustice on workers to impose that kind of a rule; that we cannot have an inspection until you prove that it is unsafe because somebody is killed or is seriously injured."

S-2153 subverts the preventive aspect of OSHA.

5. Nonserious citations do not relate to insignificant violations of insignificant standards.

Probably the greatest complaint our union has against the promotors of S-2153 is the contention they make that only "two out of every three OSHA inspections find no serious hazards . . . /resulting in/ a scattershot approach." Actually two-thirds of all inspections result in citations, about one-third of which are for "other-than-serious" violations. Admittedly a dictionary definition of those terms would indicate a situation of no great significance. However, Mr. Chairman, those words have a legal definition that the authors of the bill ignore or fail to recognize. This Committee itself emphasized the significance of the "nonserious" citations. In a November 1974 report the Committee specifically stated:

> "The . . . definition of a serious violation in the laws [Sec. 17k] allows that not all hazardous situations that result in serious injuries can be cited as serious violations, due to the employer knowledge factor. Therefore, one must consider that the number of serious violations cited may understate the number of serious hazardous situations identified."

I appeal to this Committee as the knowledgeable legislative committee with OSHA jurisdiction to decry this gross misinterpretation of these types of citations. Hopefully if a scalp count of citations or some form of quota system is being used to evaluate the effectiveness of inspections, we will at least have a more objective measurement since these represent significant violations. A serious citation requires the presence of a hazard where there is "substantial probability" that death or serious physical harm could occur and that the employer had previous knowledge of the existence of the violation. That is a rigid test -- maybe justifiably so because it carries with it a mandatory penalty.

But the absence of all those conditions does not mean that the hazard is not a serious one. It certainly does not mean that the inspections which result in such citations are "wasteful" ones.

If the case for S-2153's demand for legislatively mandating a particular inspection targeting system rests upon this evidence, our union would strenuously recommend that you reject the proposal.

6. Noncitation inspections are not wasteful inspections.

Again the Schweiker bill denigrates the effectiveness of the preventive inspections of OSHA. The fact that inspections are held in nontargeted plants has a "rippling-out" or "leveraging" impact in non-inspected plants. It is precisely because OSHA cannot inspect every worksite that leveraging must be a key part of any enforcement strategy. For instance, I have heard no criticism of the follow-up inspections of which 91 percent result in no citations. Indeed there should be none.

7. Voluntary safety activities will be seriously curtailed by the Schweiker bill.

Contrary to the contentions of the promotors of S-2153, there are at least four aspects of the bill which will impair voluntary compliance:

1. The foreknowledge that a workplace will be exempt from general schedule inspection. There is no need to comply until a year after a number of serious injuries have occurred;

2. The limitation on the workers' right to seek a special inspection;
3. The restriction of the scope of allowable complaint inspections of qualified employers' establishments;
4. The elimination and/or lessening of penalties where there are plant safety committees;
5. The elimination of plant safety committees' records as evidence of willful violations;
6. The enticement to gerrymander a workplace to avoid inspection as permitted under the definition of a "workplace."

There is no doubt that S-2153 does indeed restrict workers' right to request a special inspection. Polemic material, defending the provisions of the Schweiker bill, proclaim "S-2153 preserves OSHA protections for all workers by specifically permitting inspections in all workplaces to resolve employee complaints." On the contrary the bill requires OSHA and, by inference, workers to first notify employers that a complaint regarding hazardous conditions has been lodged with the agency. This forewarning can give the employees, especially in unorganized plants, pause because of fear of retaliation.

More importantly OSHA will be barred from entry unless the employer fails to give "satisfactory assurance" that the violation has been corrected. Most employers will resist inspection, allege no violation and/or claim adequate abatement. The Schweiker bill puts the employer in a privileged position since OSHA would have the burden of disproving the employer's contention. Presently under the Act, Section 8 inspection entries do not place any conditions upon the inspection. The Schweiker bill creates a very substantial barrier to entry. The discretion to inspect shifts from OSHA to the employer.

8. The Schweiker bill legislatively establishes a legal tolerance of a certain amount of injury in the workplace.

Employers may submit affidavits declaring that they had less than two lost-time injuries per 100 workers. In a plant of 1000 there can be as many as 19 such injuries. No recognition is given to the severity of the injuries. For instance there could be an injury record of 19 amputations. Yet that plant could be declared safe and exempt. The existence of hazards, the incidence of numerous non-lost-time injuries, and the occurrence of non-disabling accidents would in no way jeopardize the employer's "qualified" or exempt status.

9. Schweiker bill does not streamline the OSHA program.

While the Schweiker bill does exempt worksites, it does not lessen the OSHA intrusion. Unfortunately the OSHA intrusion created by the bill is of the negative type. The filing requirements will be horrendous. The records, because of the shifting nature of their content, will be most confusing. Plant managers will never know from one year to another as to whether they are covered. Workers will not have any assurance as to whether they are first class or second class citizens under OSHA; i.e., whether they retain maximum protection or not. Confusion will certainly be the result of the ill-conceived bill. A recent Centaur Associates study indicates that there will be great shifting between exempt and nonexempt status. While during one year 70 percent of all firms would qualify for an exemption; for three years the figure drops to 50 percent. For smaller firms the shifting pool of firms is about 35 percent; for intermediate sizes, the shifting pool ranges from 23 - 32 percent; for larger firms the shifting pool is about 24 percent.

This shifting of legal rights and responsibilities will indeed by tragic.

9. The Schweiker bill exempts unsafe workplaces from Inspections.

Workplaces which might be unsafe would nevertheless be exempt if the workplace had no fatalities and a lost workday to employment ratio below a stated level. For example the Republic Steel plant in Chicago, Illinois, would have been exempt from inspection in 1977 based on the plant's accident history. However, this so-called safe plant suffered a fatal accident in 1977 and again in 1978. Other examples of so-called safe plants suffering fatalities the following year can be produced.

CONCLUSION

Mr. Chairman, our union has always opposed exclusion of workers from coverage of OSHA. The current debate could be productive if we could consider it as an indicator of Congressional desire that OSHA accelerate the development of its various targeting techniques. OSHA could be required to establish some demonstration projects so that the various systems could properly be evaluated. But most importantly we would hope that the Committee would acknowledge that "targeting" is not a code word for exempting workplaces; that workers' rights under the 1970 Act are not divisible; and that OSHA must maintain a preventive potential.

However, it would be counter productive if the Act was subjected to legislative changes along the lines of the bills presently before this Committee. We urge their rejection both here, in the appropriations process, or as riders to other bills.

The **CHAIRMAN**. A strong statement, Mr. Sheehan, and we thank you and all who have joined you here today.

Let us go into a few questions here. I think you have most adequately expressed all of your opinions and given the backup data that will be useful and has now been made part of our record.

I understand the main thrust of your objection to S. 2153 is the concept of exempting certain workplaces from scheduled safety inspection. However, you do recognize the need of some sort of enforcement targeting by OSHA in order for the agency to maximize its effectiveness, and mindful of its limited enforcement resources.

OSHA has told us that it concentrates 95 percent of its scheduled safety inspection on workplaces within the so-called high-hazard industries—and this is based on the data provided by standard industrial classification by BLS. Further, we have been told that OSHA tends to concentrate the remaining 5 percent of its scheduled safety inspection on agricultural workplaces with migrant labor camps.

It seems to me that the targeting mechanism which OSHA currently uses, indeed any administrative targeting, will result in exemptions as a matter of fact from scheduled safety inspection, and I wonder why these exemptions in fact are any different from exemptions in law which would be created by legislation, and specifically, S. 2153.

Mr. **SHEEHAN**. Well, I think that question involves a lot of comment. No. 1, the fact that we do have a limited inspection force does mean that numerically, we have a small number of places that will be inspected.

There is no way that you can avoid that. You will always have a limited amount of places that will be inspected. That is one point to differentiate from the fact that whether you have targeting defined or a vague targeting system, no matter what you do, you are still going to be getting into only 2 or 4 percent of the workplaces.

The other point, however, is that since OSHA can only go into 2 to 4 percent of the workplaces per year these must be at least the likelihood that it might go into those places that are not going to be inspected that year. The likelihood that they might be inspected is for us the deterrent or preventive aspect of OSHA.

The **CHAIRMAN**. Well, that was the point that I made. From OSHA's testimony, it looks like the likelihood of inspection of a workplace in a low-hazard industry is virtually nonexistent. After 95 percent of the inspections are conducted at high-hazard industries, you are left with 5 percent, and this is going to be concentrated we are told, largely at migrant labor camps. And you and I know from over a period of better than a decade that we have worked together on all of the problems in those migrant labor camps, that the hazards are there; we know it. I am glad they are going there, personally.

But again, it would seem to me that all the other workplaces will know that they are not likely to be targeted for an OSHA inspection, and that fact would reduce, almost to nothing, the anxiety that they might be inspected.

Mr. **Sheehan**. Could I question the idea that the 5 percent are limited to——

The **Chairman**. Not absolutely, no. It is not a statutory limitation. It is an administrative——

Mr. **Sheehan**. The concept that they were directed at migrant and agricultural——

The **Chairman**. That was what the Administrator said.

Mr. **Sheehan**. Well, I am reading from Basil Whiting's testimony, which said that:

> We decided to focus 95 percent of the scheduled inspections on high-hazard industries. The remaining 5 percent are intended to provide the continued presence of OSHA in all worksites, thereby underscoring the obligation of all employers to comply with the act.

So at this point at least in his testimony, he did not say that OSHA was just going into agricultural and migrant camps. It could very well be that if you took a look at the 5 percent, maybe your staff could show that OSHA showed up in these particular workplaces.

The **Chairman**. By the way, on that Dr. Bingham was the one who gave us that migrant camp——

Mr. **Sheehan**. OK. I am just reading from Basil Whiting.

The other point that you would have to consider is the 95 percent of inspections going into high-hazard areas. Some of that 95 percent is directed at what, under the definition of this bill, would be considered "qualified employers." So it is hard to say what portion of the 95 percent would also be eliminated under this bill. The preventive stimulant involves more than 5 percent of inspections.

But the basic answer, Senator, relates to targeting. Sure—make some recommendations if you wish on targeting. But you do not need to legislate in that area. Limited work force means OSHA gets into a limited number of workplaces. That is why, however, we must keep open the likelihood of inspection of all the other workplaces, so that they do not slide off the ledge into noncomplicance. That is why we must also keep intact the workers' right to complaint, to bring OSHA into those places that, for one reason or the other, that year or the next number of years, might not be inspected.

Mike Wright, from our Washington staff, would like to make an additional comment on this issue.

The **Chairman**. Mr. Wright?

Mr. **Wright**. Thank you, Mr. Chairman.

I just wanted to mention one thing, quickly, which was that in your question, you referred to the targeting of general scheduled inspections. We, of course, are concerned about all inspections, as are you, and it is our contention that certainly, one of the most effective tools, and perhaps the most effective tool, OSHA has for targeting its resources is to listen to the workers in the workplace, and then when they file a complaint, to go into that workplace.

Now, it has been said that the bill preserves that right, and in a narrow legalistic sense, that is correct. But the problem is that when OSHA receives a complaint under the bill in a nontargeted workplace that happens to be exempt, OSHA has to go through an exceedingly long and cumbersome procedure, beginning with calling the employer. I do not know any employer who is going to say, "Yes, that hazard still exists; therefore, come and inspect me." And at that point, it is going to be a long and difficult court battle over whether or not OSHA ultimately gets into that workplace. And, win or lose, that court battle is going to take a long, long time. And under that situation, the effective right of a worker to complaint and receive an inspection is negated. And under that system, I think the most effective means that OSHA has for targeting its resources, listening to workers, is going to be eliminated.

The CHAIRMAN. I certainly share all of your feelings about the importance of a responsive complaint procedure. It seems to me that under any scheme of targeting the agency's enforcement activities, complaints are the failsafe mechanism. Where a worker has the right to complain, and where the worker knows that that complaint will be treated responsibly, complaints become the means by which workers can direct the agency's attention to hazards in workplaces which the agency, in the course of its normal targeting, would not necessarily inspect.

But, the question, it seems to me, is whether providing anything less than an automatic inspection in response to a complaint really makes the complaint procedure any less effective. This certainly warrants our attention. We would have to know if there is any way of developing a rule of thumb on how the Secretary would evaluate a complaint to determine if an inspection is really warranted. It seems to me that the Secretary should be able to evaluate a complaint and determine whether it warrants instant action, or whether it alleges a matter that is so trivial that it is not worthy of expending the agency's limited resources by conducting an inspection. It would seem to me that we can't make those decisions merely on the basis of whether the complaint is oral or signed.

Mr. SHEEHAN. Let me indicate this, Senator, that whether we have an effective complaint system or not—and of course, we are arguing against what 2153 does to restrict the complaint system—whether we have the most effective complaint system in place, and even if the current procedure would not be changed, that should not be used as an argument against our contention that these workplaces must continue to come under the coverage of the likelihood of a general inspection, because really, what we have going for us, Senator, are really two elements in the "qualified workplaces" under this bill, the so-called exempt workplaces, that is those that now do not end up being inspected. We have got the attitude on the part of the employer that he might be inspected—not that he might be inspected because a worker may complain. Surely, a lot of these places are inspected because a worker did complain. But the possibility, regardless of whether there was a complaint procedure, that he might yet be inspected has undoubtedly been, let us say, the rippling out, the leveraging effect—we use that term—of the OSHA presence in the workplaces of America. The fact that the highway police are on whatever the most traveled route is because there is where all the speeders are, does not mean that you do not announce to the rest of the State that we are not going to be on Route 88 for instance in Pittsburgh, because then all of a sudden, you will get people speeding there.

The issue we are trying to indicate Senator, is the universality of the coverage of this act as far as OSHA's inspections, and maybe—maybe—the real measurement of OSHA's effectiveness is not to be found in the actual places that it has inspected and what the cleanup was afterward, and how much the injury rates have come down. It is necessary to evaluate the fact that there are many other places that have not seen an OSHA inspection, but they know there is a possibility of an OSHA inspection. That is the other factor that we are not measuring in the terms of OSHA's impact. It is that aspect that we are trying to protect.

Surely, the complaint procedure pulled some of the OSHA inspectors in, but OSHA goes into these other places without a complaint request. That is what we are trying to preserve here. That has been the value, I think, of the universal coverage of OSHA when it was enacted in 1970, and certainly, Senator, there does not seem to be an abuse here. Where is the abuse? Someone said, "Well, we want to help OSHA out. We want to target its work force." Well, OSHA has told you that it is targeting. Are there going to be 57,000 inspections per year? I would hopefully assume that there will remain that number. But it is where they go, and the discretion to direct them—the discretion by the agency—I think we all can very honestly make the claim now that OSHA has accumulated a great deal of experience in this area. Everybody is impressed by that—the targeting mechanism, the more refinements that are coming up—these have all been part of the evolutionary progress that has been taking place. Why do we now come in and say, "You are not doing any good. The targeting is not any good. We think it is an abusive targeting mechanism," and then come in with this targeting mechanism as mandated by S. 2153.

OSHA has been improving in its tartets. But this bill goes about getting at the places where OSHA normally might inspect. Yet the stimulative, the preventive aspect of OSHA will be defeated, will be denied, will be eliminated if this bill passes. That is what we are trying to indicate here. And there is no amount of improving the complaint procedure that would be worth the price for allowing the exclusion of these so-called safe workplaces.

I think there is an understanding that somehow, if you improve the complaint section of the bill, it will be enough, and then we can go about and exclude these places from coverage. That is not enough, Senator. That is only one tool, the complaint procedure. The other one is the likelihood of inspections.

The CHAIRMAN. Senator Schweiker?

Senator SCHWEIKER. Thank you, Mr. Chairman.

I have no problem at all with earmarking 5 percent of unannounced, routine inspections to nonhazardous workplaces. I do not think that clogs the pipeline, which I have been concerned about, and I do not think that it defeats the purpose of the targeting. So, in terms of the preventive value of preserving those inspections, I have no problem with that. I do not think that fundamentally gets to a difference in approaches, since we are only talking about 5 percent.

I gather from what has been said 5 percent, of course, is the number that OSHA now targets to nonhazardous industries.

I have no questions, at this point. I obviously differ in terms of my interpretation of the impact of my bill on the effectiveness of the system, and the present system, but I certainly respect Mr. Sheehan's strong feelings and work in this area, and certainly, we will take them into account.

We have had 8 days of hearings, and of course, during the 8 days, I have had an opportunity from this end to establish what my interpretation and what the impact of the bill is as I see it. I have actually spent a lot of time doing that.

So I do not have any questions, but certainly appreciate very much your strong work in this field. I know the steelworkers have long been active as leaders in this area and also have been very constructive in terms of working for a safe workplace. So I thank you for that.

Mr. SHEEHAN. Senator, could I add just one other comment. I know that we are all expressing deep concern about this bill, and certainly your own role in it, I do not think that our union can ever ignore the fact, nor would it want to, that in 1970, your efforts in bringing about, at a time of total ignoring the workers in the workplace, was most instrumental and helpful to us. Back in 1970, nobody gave a damn, and hazards were considered a condition of work. I think the legislators—and you were one of them—did a tremendous service to the workplace and to us. We have now put in place since that time, Senator, a tremendous establishment. It is not just the OSHA agency. It is not just the inspectors, and it is not just the Labor Department. What has been put in place, Senator, is the infrastructure of safety in this country. We have involved the professional people, the academic people, the scientific people. There is a whole structure out there now, and OSHA has been a part of that. And your role in this was certainly most pronounced.

We do have a disagreement with you now. We would hope that the result of all the testimony coming forth would indicate to those who want to target OSHA to go ahead and help devise the mechanisms, but stop short of legislating it and of excluding workplaces. If I could just use this analogy, Senator. As you were indicating, "Why get all uptight about 5 percent of the inspections." Another way of looking at the 5 percent is that your bill would most definitely keep under coverage of the general inspection something like 10 percent of the workplaces, or whatever the actual number is. It keeps them under coverage. Both you and I know that even the 10 percent of the workplaces that would remain under the coverage of the bill for the general inspection will not be inspected either. It is only going to be, whatever 2 percent inspections means in the 10-percent coverage area. Many of the 10-percent places are not going to be inspected. And that is the point that I would hope that we could leave with you. However the fact that, even within the 10-percent category, some workplaces will be inspected will have a rippling out effect on the other employers in those categories because they might be inspected. The fact that they are not exempt under your bill even though not inspected that year because of the limited work force inspection does have this preventive impact upon them. It is that they might be inspected.

So I am really trying to use your argument Senator. I am trying to indicate that if it is valid, if it works within that select category of the 10 percent of employers, some question will not be inspected even under this bill, why do you deny the logic of that argument in the other category, the other 90 percent—even though they might not be inspected? The presence of OSHA through actual inspections and through the likelihood of inspections is felt in both categories, and that is the point we are trying to get across.

Senator Schweiker. Well, I suspect you did not hear what I said. I said in my response that I had no problem at all in accepting a 5-percent figure and putting that across the board. If we can limit it and define it in terms of 5 percent, I see no problem. I think that if that has a beneficial preventive effect——

Mr. Sheehan. What do you mean by that? What do you mean by the 5 percent?

Senator Schweiker. Just what I said. Sometimes in a dialog, we get our minds set that we do not hear people. I am saying in essence that——

Mr. Sheehan. You want to allow 5 percent of the inspections to go into so-called nontargeted areas——

Senator Schweiker. Yes.

Mr. Sheehan [continuing]. And that you would devise a rigid formula for identifying the nontargeted areas. And anybody that falls inside that formula will be subjected only to the 5 percent, nontargeted inspections—what do you mean by that?

Senator Schweiker. The targeting, which you concur with, in essence tries to put the action where it should be. On the other hand, we know that with limited resources, we will not have the action everywhere it should be.

So what I am saying is that if we clearly define or use the 5 percent figure that OSHA now uses, and using that to look at all the other places as well, since under my bill, they are not exempt from the rules anyway, I have no trouble with accommodating that and putting a 5 percent inspection provision on nontargeted workplaces. I think that would not defeat the purpose of my bill, which is to target. And it will give the one thing that you folks seem most concerned about, which is the threat of an inspection.

So if you are saying that, I have no trouble with 5 percent.

Mr. Sheehan. Well, I think what you are saying—and we will have to see, eventually although it is kind of hard right now to understand precisely what you are saying—but it seems to me that you would indicate that OSHA at any one time would have to direct 95 percent of its inspections into some kind of a targeted area. You would define that by some kind of legislation. I think we have indicated to you that statutory definitions are very risky. But be that as it may, you would say that 95 percent, of the inspections would have to stay within these bounds. "We will let you take only 5 percent and you can roam around out there with only 5 percent." I assume that that is probably what you are talking about.

The other point you were making is that the complaint procedure is clogging up the works. Senator, you know, we have learned from the hearings the statistics whether there is the clogging up of the works. What are we really talking about? The GAO report, that makes reference to that allegation, nevertheless shows that the citation profile for the complaint inspections, in terms of compliance, and serious, and other than serious citations, is comparable to the so-called targeted inspections' citation profile. It is the one-third incompliance, one-third serious citations, and one-third nonserious citations. Also in that GAO report, it shows that even though the worker does initiate OSHA coming into the workplace, and although he may not be precise, and the inspectors find no violations in the specific area of the complaint, nevertheless, that same inspection does result in the fact that serious and other than serious violations are found. That profile is the same as we find with other inspections in targeted plants.

Again, I think some of the explanations of the clogging up of the inspection system is based upon, a bad interpretation of what "other than serious" citations mean, Senator.

Now, if the profile for the complaint procedure looks the same, I would hope that you would take another look at the necessity for your proposal.

Senator **Schweiker**. You do understand my position now on the 5 percent, or not? I am not clear.

Mr. **Sheehan**. It seems to me what you are saying—and we do not have any language here in front of us—but as I understand, 95 percent of OSHA's inspections shall by law be directed by a legal definition, or a statutory definition of what is an unsafe workplace. You will use lost workday records, or you will use injury and incidence rates. You will fix upon some kind of system by statute. You will nail it down by statute that these are the unsafe workplaces, and when OSHA makes the 60,000 inspections, 95 percent of them must be in this area. Then you say, "We will allow you, with your 5 percent, to go into the 'nontargeted' areas." At that point, certainly you are doing one thing. You are nailing down by way of legislation that there shall be one prescribed targeting mechanism. You may even say, "Well, I will not even be uptight on that. Let us make a meld of a number of targeting procedures, because that is the best information we have at this point." But nevertheless you will nail it down at that point in time by legislation. I would assume that that is what you would do. Otherwise, why bother legislating, because OSHA is doing this by administrative action. OSHA is doing this, and there must be something you do not like about it. Therefore the complaint is about the 5 percent of inspections, and here you are saying, "Let them roam around." I guess that is what you are saying.

Senator **Schweiker**. I picked your figure on the 5 percent.

Mr. **Sheehan**. I understand.

Senator **Schweiker**. You argued a few moments ago that the 5 percent inspection on OSHA's part was an inherent——

Mr. **Sheehan**. I did not argue about the 5 percent. I argued that all the other workplaces are subject to the likelihood of inspection. The fact that OSHA at any one time comes in with 5 percent, that is their figure.

Senator **Schweiker**. OK.

Mr. **Sheehan**. The fact that the 95 percent, Senator—some of those 95 percent inspections—that is the point I am trying to get across—are really in the nontargeted area, also.

Senator **Schweiker**. Well, they argue not, because they said that everything is targeted now. That is what Dr. Bingham said.

Mr. Sheehan. Well, yes, but these hazardous workplaces are in SIC categories, Senator, and they are not firm specific. And I think it is your position that since it is not firm specific, that you are entering into plants that are safe.

Senator Schweiker. That is all I have, Mr. Chairman. Thank you.

The Chairman. I would like to make the observation to you, Mr. Sheehan, that we do know that many of your rank and file have come here, away from work for a day, and that is meaningful. It shows the depth of feeling that workers have about OSHA, and its importance. And I note that with respect and gratitude, as a matter of fact. Your people are expressing themselves this way, losing a day at work to be here.

Thank you.

Mr. Sheehan. Thank you. We appreciate your recognition.

The Chairman. Our next witness is Mr. Jacob Sheinkman, secretary-treasurer of the Amalgamated Clothing and Textile Workers Union.

We welcome you, ladies and gentlemen, and look forward to the statement from the Amalgamated Clothing and Textile Workers Union.

STATEMENT OF JACOB SHEINKMAN, SECRETARY-TREASURER, AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, ACCOMPANIED BY ERIC FRUMIN, ACTING DIRECTOR, DEPARTMENT OF OCCUPATIONAL SAFETY AND HEALTH, AND ELIZABETH SMITH, LEGISLATIVE REPRESENTATIVE

Mr. Sheinkman. Thank you, Mr. Chairman.

My name is Jacob Sheinkman. I am the secretary-treasurer of the Amalgamated Clothing and Textile Workers Union, which represents one-half million men's clothing, textile, shoe and other softgoods industries in the United States and Canada.

Appearing with me today is Eric Frumin, the acting director of our department of occupational safety and health, and our legislative representative, Elizabeth Smith.

We appreciate the opportunity to testify on S. 2153. It is a matter of utmost concern to the officers and members of my union, as well as to workers throughout the Nation.

We oppose this bill, both as it stands and in any amended form. In our view, it is an antipeople piece of legislation, and represents an unhealthy trend in the changing political ethic in our society. It runs counter to the basic democratic principles of our society, as well as our longstanding national commitment to protect the welfare of the citizenry.

We seek to convince the members of this committee that this bill should be rejected entirely, and that passage of any such legislation amending the act at this time would be a disaster for American workers.

I will not attempt to go into all the objections that we have, Senator. They are described in detail in our written submission.

However, the entire thrust of the bill to exempt so-called safe workplaces can only have one result. It will force workers to suffer death or serious injury—and I want to underscore that—before action is taken to prevent further injury. This to me is unacceptable in a civilized society.

I ask you, Senator, what if we were to apply the same principle to the administration of our criminal justice system? How many people would have to be killed or beaten before the police would make arrests in a "safe" community? And I say to you, Senator, that workers are being killed and beaten on the job every day by the thousands, and they deserve as much protection inside the plant as outside the plant. This bill would in effect legislate a second-class citizenry, and that is a frightening prospect for our society as a whole.

What is of more concern to me is that this is one of the many continuing and mounting attacks on workers' rights which is being conducted by big business and its supporters in Congress. We have seen this most recently in consumer protection legislation, labor law legislation, and minimum wage legislation. In the specific area of worker safety, such attacks have been viciously attempted—and often succeeded—in putting workers at "increased risk of material impairment of health or safety" by the restriction of the use of OSHA appropriations in specific enforcement programs—I refer specifically to the Johnston amendment barring enforcement of the cotton dust standard, which passed the Senate in 1978.

We have also seen an increasing number of employer contests of OSHA citations in bad faith for the sole purpose of delaying necessary expenditures. In the area of labor law generally—and I want to refer to some testimony by previous witnesses today—it is much simpler and cheaper to litigate an unfair labor practice and a discharge of a worker on the job in order to thwart union organization. Much litigation under OSHA is conducted by employers for the sole purpose, in many cases, of delaying the enforcement of the citation and the requirement for actual compliance with the necessary OSHA rules and regulations.

Other employer attacks on worker rights under OSHA are the growing challenges to OSHA's entry into the workplace, and the establishment of exclusionary hiring and promotional policies which discriminate against women, racial minorities and disabled workers rather than correcting the hazard in question.

This bill would only continue this attack and inflict deep, if not fatal wounds into OSHA's effectiveness as the defender of the human right of workers to a safe workplace environment.

It would cripple the agency by imposing unbearable administrative requirements and return us to the Dark Ages of State enforcement when government safety inspectors counted bodies rather than violations.

And here, I want to say specifically that recently, our members have been told that our leaders are wrong about this bill, that this is a genuine attempt to improve worker safety, and that we are merely engaging in election year politicking. To those who make such statements, I suggest that I and other officers of my union were elected—not appointed—by our members to represent their interests, and that anyone actively supporting this bill would not win an election for shop steward in one of our union locals.

However, if electioneering is the issue at hand, I must ask the members of this committee:

Why is the committee in such a rush to act on this legislation?

Why are the legislative hearings held so soon after the oversight hearings, when the record of those earlier hearings is not yet even completed?

Why are these hearings so short as to prevent rank-and-file workers from testifying as to the true conditions of the workplace?

Why doesn't this committee hold hearings in Pittsburgh and in Greenville, S.C., to hear from steelworkers and textile workers of this country in 1980, just as the committee did in 1970?

What is the rush? If the answer is electioneering, as I repeat it is, then the shoe fits on those leveling those charges.

The campaign on behalf of this bill represents a crass and callous capitulation to the hysterical atmosphere against Government regulation now being created in the Congress. It is heartless, sinister, and motivated by concerns for the health of America's corporate profit centers, rather than the safety of the American workers or the security of their families.

We are opposed to this bill and will bend all of our resources and energy to see that it is defeated.

Thank you, Mr. Chairman.

[The prepared statement and additional material submitted by Mr. Sheinkman follows:]

TESTIMONY

of

JACOB SHEINKMAN, SECRETARY TREASURER

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO

before the

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

LEGISLATIVE HEARINGS

on

S-2153

Washington, D. C.

April 25, 1980

INTRODUCTION

My name is Jacob Sheinkman. I am the Secretary-Treasurer of the Amalgamated Clothing and Textile Workers Union, AFL-CIO, which represents a half-million workers in the men's clothing, textile, shoe and other soft-goods industries in the United States and Canada. Appearing with me today is Eric Frumin, the Acting Director of our Department of Occupational Safety and Health. ACTWU appreciates being given the opportunity to testify today on S-2153. It is a matter of utmost concern to the officers and members of ACTWU, as well as to workers throughout the nation.

ACTWU opposes S-2153, both as it stands and in any amended form. It is an anti-people piece of legislation, and represents an unhealthy trend in the changing political ethic in our society. It runs counter to the basic democratic principles of our society as well as our long-standing national commitment to protect the welfare of the citizenry. We seek to convince the members of the Committee that this bill should be rejected entirely, and that passage of any such legislation amending the Occupational Safety and Health Act at this time would be a disaster for American workers.

I. EXEMPTIONS

The most objectionable feature of the bill is its goal of exempting workplaces from inspections. The intent of the bill is to target inspections to the most hazardous workplaces. The effect of the exemption provision, however, would be exactly the opposite. It would create additional hazardous workplaces, by removing a major incentive for employer vigilance -- the threat of an OSHA inspection. One cannot underestimate the effectiveness of this threat in convincing employers to correct hazards. Local union officers, safety representatives and rank-and-file members frequently report the successful use of such a threat in forcing laggard employers to eliminate hazards identified by workers. We have also seen the general improvement of workplace safety by employers acting in good faith, as a result of the establishment of a uniform national enforcement program, even where there is no specific complaint from workers. We will not attempt to engage in a debate over the interpretation of official statistics on worker injuries and illnesses. However, it is worth repeating that the statistics under discussion are the reports of worker injuries, and changes in these numbers are as much a measure of the sincerity of the reporter as the actual occurrence of injuries.

However, irrespective of reported incidence rates, it is our firm belief that employer fears of inspection have served as an effective mechanism to promote workplace safety. That mechanism is the foundation which now underlies the remarkable growth in joint labor-management safety programs. It is also the only effective counter-weight to employer negligence in unorganized workplaces. These subjects will be discussed in greater detail in the sections that follow. Suffice it is to say that targeting can best be accomplished by administrative policy, such as that already adopted by OSHA, and not by legislative exemptions.

A. Criteria for exemption under S-2153

Even if exemptions were to serve a useful purpose, the criteria for exemption proposed under S-2153 are grossly inappropriate for determining "safe" workplaces. Requirements for employer reports to state worker compensation agencies are either non-existent, inconsistent or inadequate to accurately reflect the incidence of injuries and illnesses in the workplace. The bill makes no serious attempt to change the reporting requirements or administration of state compensation laws. In fact the experience of the Committee in the area of federal standards for state laws over the past few years has been marked by frustration and failure to develop satisfactory legislation.

The most serious problem created by use of state worker compensation data to establish an employer's eligibility for exemption is the incentive not to report. It stands to reason that many employers will use whatever means are available to keep reported injuries at an exempted level. One such means will be encouragement of workers to withhold the filing of claims in exchange for awards (and even cash prizes) if the lost-time injury rate for a particular group fails to reach a specified level. This creates peer pressure on the injured worker not to report (despite any employer statements to the contrary about a worker's protected right to file a claim).

Where simple encouragement or cash offers do not succeed, employers will likely resort to a method which enjoys widespread use now in industry -- threatening workers with loss of a job, promotional opportunities, or other benefits in order to force the worker to return to work on a so-called "light-duty" job created especially for that purpose. Workers frequently recount stories of their brothers and sisters being sent back to work in a wheel chair or on crutches by a supervisor, plant nurse or company doctor in order to avoid the reporting of a lost-time injury. The problem is magnified many times over for workers in unorganized plants. Employees in such workplaces have no realistic mechanism whatsoever to withstand such abuse. The horrendous experience of workers in predominantly non-union industries such as textile manufacturing should be adequate reason to draw a clear and unmistakable separation between the administration of the OSH Act and the operation of state compensation laws. In fact, the failure of the states to provide realistic penalties against employers for failure to report worker injuries clearly indicates that any such linkage would work only to the deteriment of workplace safety.

Another objectionable aspect of the criteria proposed by S-2153 is the use of historical data from individual establishments. There has been no evidence offered by the sponsors or other supporters that the past record of an individual workplace is a reliable predictor of current or future conditions. Our members have already suffered enough death or serious injury to support this objection with gruesome detail. The following examples are instructive.

-- ACTWU members at the Ensign-Bickford Co., Simsbury, Conn., manufacture explosives (as well as other plastic and chemical products). In September 1978, the employer was rushing to start up operation of a new production line. His supervisors disregarded worker complaints that vacuums used to collect excess black powder were not functioning properly. An explosion occurred due to this negligence, resulting in the injuring of six and the hospitalization of four workers (some for as long as a month). OSHA cited the employer for willful violation of the General Duty Clause. In 1976 and 1977, the company records reveal 4 lost-time injuries per year, or 0.5 per 100 workers (a total of approximately 850 employees). Thus, prior injury records bear little relationship to the appearance of new hazards.

-- ACTWU members at Avtex Fibers, Inc., Front Royal, Va., manufacture rayon fibers. Carbon Disulfide (CS_2) has been a hazard to rayon workers since "articial silk" was first developed at the turn of this century. In addition to causing serious illness, it is also highly explosive. In July 1979, a supervisor instructed a worker to open a reactor vessel before it was depressurized. Large amounts of CS_2 escaped into the atmosphere. An explosion occurred which seriously injured 5 workers of whom 4 were hospitalized for as long as 3 months. Virginia state OSHA sent an inspector who eventually cited the employer for violation of the General Duty Clause (for improper instructions to employees on opening of reactor vessel) and the National Electrical Code (for improper light fixtures causing fire hazard in an explosive environment). Two months after the explosion, Wayne Allen Bly, a 19 year old fork lift driver was killed when he was struck by another truck whose forks and load were in the raised position. Federal OSHA investigated, and issued citations for several violations involving improper operation of fork lift trucks. In 1978, the plant which employs 2,000 people, had a total of 18 lost-time injuries. Thus, prior injury records bear little relationship to the likelihood of a continuing hazard resulting in an accidental injury.

B. Restricted scope of inspection in exempt workplaces.

The proposed legislation would greatly hinder the identification of serious hazards by restricting the scope of any inspection in an exempt workplace to only those areas covered by a complaint or directly involved in an accident or imminent danger. Our experience clearly demonstrates the importance and productivity of conducting broad inspections immediately after a hazardous incident. It is at just such a time when both workers and employers are more "safety-conscious", and are more likely to be of assistance to a compliance officer. The two examples mentioned above are instructive. Following their initial investigation of the explosion and fatality, respectively, at the Ensign-Bickford Co. and Avtex Fibers, Inc., Federal OSHA undertook a detailed inspection of the plants involved. At Ensign-Bickford, they found 3 additional willful violations involving the handling of explosives and 89 serious violations for explosives, machine guarding, electrical hazards, and overexposure to lead and noise. At Avtex Fibers, they found 41 serious violations of 14 separate safety standards (in addition to those already mentioned involving fork-lift trucks). These inspections would have been barred were S-2153 in effect at the time, and the serious violations would have never been uncovered. How many more explosions or fatalities would Senator Schweiker have these workers endure before such a restriction could be lifted?

C. Interference in complaint procedures

The most regressive aspect of the exemption provision is its impact on worker complaints. The procedure established under S-2153 for notification of employer is not appropriate for handling formal complaints involving any but the most minimal hazards. It is unrealistic to expect compliance officers to adequately screen all complaints to determine whether a true imminent danger exists or whether an alleged violation is related more to health than safety. Such determinations must be made by an inspection, as OSHA now does under its revised procedure for complaint-processing.

The procedure under S-2153 also places undue reliance on workers to verify the adequacy of an employer response to the notification from OSHA, even when the employer is acting in good faith. A recent experience demonstrates this. In February, 1977, ACTWU members at the Globe-Albany Co. in Buffalo joined with the employer on a Labor-Management Safety Committee. Both sides agreed that the procedure for shutting down looms during maintenance operations was unsafe. The company proposed a system of "red-tagging" the switches on machines during maintenance to warn against starting operation at the loom. The union agreed. In October, 1977 Richard Bogdan, a 22 year old young maintenance worker was working on a loom when it was turned on by another worker. Bogdan was killed instantly by a blow to his head. The red-tag system proposed by the company was a clear violation of 1910.262 (h) (2) which requires locking-out of looms during maintenance. Perhaps the employer was unaware of the standard and was acting -- somewhat ignorantly -- in good faith. However, the fact that the workers agreed to the red-tag system shows again that there is no substitute for technical expertise. Workers are often but certainly not always -- as knowledgeable as employers and even compliance officers on the safety requirements in their workplaces. It is unfair and dangerous, however, to expect them to bear the burden of evaluating the adequacy of employer abatement efforts. This is especially the case in unorganized workplaces where employees have no mechanism at all to seriously question other employees or supervisors on the safety activities of negligent or hostile employers. Workers asking such questions are frequently labeled troublemakers and subjected to various sorts of pressure. The impact on other workers is a clear "chilling effect" on the entire subject of safety in the workplace.

Finally, the revision of complaint procedures as proposed in S-2153 creates numerous opportunities for employers to delay a needed inspection. Firstly, the employer can misrepresent the adequacy of his abatement effort to create the appearance of "satisfactory assurances" while not actually correcting the hazards. If this is unsuccessful in dissuading OSHA from making its inspection, the employer can always refuse entry to the compliance officer and throw the dispute into a warrant proceeding. It is patently absurd to expect a District Court magistrate to determine whether or not the employer's assurances are satisfactory. In fact, the entire thrust of this provision is to deny workers the right to an inspection based on a legitimate complaint. The failure of the state programs in this area was one of the major reasons for the passage of the Act 10 years ago. With the memory of the supporters of S-2153 growing shorter daily, the right of workers to secure an inspection must be firmly upheld by the Committee and all such attacks rejected.

D. Non-productive enforcement of exemption requirements

In order to properly carry out its responsibility in exempt establishments under S-2153, OSHA would have to review a variety of employer activities involving administration and recordkeeping such as:

a. The employer's interpretation of the definition of a "workplace", and

b. Any discrepancies between the employer's injury incidence (as recorded on the OSHA Form 200 Log of Injuries) and his reports of lost-time injuries to the state.

Such enforcement activity, while certainly laudable, is not directed at hazard abatement. Furthermore, based on OSHA's general failure in the past to enforce it's existing regulations on recordkeeping, it is sheer fantasy to expect any meaningful enforcement of the requirements as enunciated in S-2153. As a result, the necessary enforcement of the administrative and recordkeeping requirements of S-2153 would lead to increased workplace injuries because of both the lesser resources devoted to hazard inspection and the certainty that employers will not be subject to an OSHA "audit" to verify their records. Thus, the use of prior accident records, on an establishment basis, both detracts from the targeting of compliance resources and further decreases the chance that an employer will ever be accountable for falsification of records.

II. SAFETY COMMITTEES

One of the greatest successes of the implementation of the Occupational Safety and Health Act is the encouragement of "joint labor-management efforts to reduce injuries and disease arising out of employment" (Sec. 2 (b) (1)). ACTWU has actively supported the formation of joint committees ever since OSHA was passed, and the attached Manual we prepared for local unions is evidence of this (see Appendix I). However, such efforts are only productive where they are based on a foundation of mutual understanding of the union's determination to use collective bargaining, arbitration and OSHA, if necessary, to get hazards corrected.

The arrangement for safety committees proposed under S-2153 would seriously undermine this climate of mutual understanding. All the incentives are for the employer: reduction or elimination of penalties, protection from willful citations, etc. These do not contribute to workers' safety, and they do not directly benefit workers, other than to allow their participation in powerless committee. We do not need legislation to achieve that undesirable goal. (If the authors of S-2153 want guidance on how to legislate worker authority on safety in the workplace, we suggest they consult the regulations adopted in the United Kingdom under their Health & Safety At Work Act regarding Safety Committees and Safety Representatives. See Appendix VII)

As a result of the imbalance of incentives, the establishment of the Advisory Safety Committees will create considerable suspicion on the part of workers. Workers will become once again discouraged and angry, and the cooperative atmosphere will not survive. The existing joint committees will fail.

The consequences of this failure are quite serious. Safety and health problems which should have been dealt with by the joint committee will now become grievances. Arbitrators, who are ill-suited to resolving disputes over safety hazards, will be forced to deal with these problems, and outcomes will probably not satisfy either party. We can expect more safety issues injected directly into the collective bargaining process with the inevitable resort to strikes or job actions if the disputes cannot be resolved peacefully. Furthermore, we can expect an increase in workers' exercising their rights under Whirlpool Corp. to refuse hazardous jobs because there is no worker safety committee to represent that worker in resolving this issue. This entire process will be exacerbated by any further restriction on OSHA enforcement as conceived in the exemption provisions of S-2153.

In short, S-2153 is a prescription for industrial warfare, including legal strikes, illegal work stoppages and individual refusals of hazardous work. We cannot imagine that the sponsors intend this to be the purpose of the bill, but it most certainly will be the result. It is unthinkable that the Committee would choose such a course at a time when the promotion of labor-management cooperation in the field of safety is sorely needed. ACTWU urges that the legislation be disapproved for these reasons, as well as for the problems created by the complaint and exemption provisions described above.

III. ALTERNATIVES TO S-2153: STATE PLANS, THE "WORST-FIRST"

In our testimony at the oversight hearings, we sought to impress upon the Committee the failure of the state plans to adequately ensure compliance with federal standards. We again propose that the Committee undertake a comprehensive investigation of the state programs to correct these failures, which are many times worse than problems under federal administration.

The state plans in North and South Carolina are good examples of poor programs. The administrators of state plans -- particularly in North and South Carolina -- have long since proven themselves to be either incompetent or willful in their failure to adequately enforce OSHA standards.

I recently mailed to members of the Committee this reprint of the recent series of articles on brown lung disease from the Charlotte, North Carolina Observer. (Appendix II) This series documents in painful detail the incredible negligence of the Commissioners of Labor in the Carolinas to enforce the old cotton dust standard. The Observer has pointed out the ease with which employers have obtained extensions of abatement deadlines in cotton dust citations, even over the objections of the exposed workers. ACTWU has complained about the deficiencies of the North Carolina procedures for review of employer' petitions for modification of abatement periods (PMA's), as recently as March 1, 1980. (See Appendix III) Under those procedures, workers and their representatives are effectively excluded from the review process, and the Commissioner of Labor in effect acts as an agent of the employer in approving such petitions.

In Virginia, the state enforcement program is also grossly substandard. After the state inspected the Avtex Fibers plant in Front Royal, Va. following the explosion mentioned earlier in this testimony, we requested a copy of the state's file to evaluate the state's performance. We were refused access to any documents in the file, and filed a complaint with David Rhone, the Federal Regional Administrator (see Appendix IV, letter from Matt Gillen to David Rhone, January 15, 1980 with 4 attachments). He responded by notifying Commissioner of Labor Robert F. Beard, Jr. that the state's policy on information was "overly restrictive" and conflicts with established federal policy (see Appendix V, letter dated March 10, 1980).

Mr. Rhone also commenced his own review of the state's inspection of the explosion. His review found numerous deficiencies (see Appendix VI, letter from David Rhone to Eric Frumin, March 27, 1980), most of which were in the employer's favor (improper classification of violations, reduction of penalties, failure to notify union of company request for exclusion of abatement period).

The Front Royal case is but one example. The entire Virginia system is designed to frustrate enforcement by having all employer appeals of citations heard by county judges, with no record kept of the proceedings and no issuance of formal opinions to allow the development of a body of case law. It is inconceivable that enforcement could be effective, particularly in high-hazard workplaces, under such conditions.

In view of the problems described above, it would appear that this Committee, and the sponsors of S-2153, could direct attention to the most hazardous situations by forcing improvement of grossly negligent state plans. To ignore these problems and at the same time to restrict the effectiveness of superior federal enforcement efforts raises serious questions as to the sincerity of the sponsors of S-2153 and similar measures in the area of worker safety and health.

IV. CONCLUSION

The proposed legislation is only one of many continuing and mounting attacks on worker rights generated by Big Business and its supporters in the Congress. We have seen this most recently on consumer protection, labor law reform and minimum wages. In the specific area of worker safety such attacks have viciously attempted --and often succeeded-- in putting workers at "increased risk of material impairment of health or safety" by:

-- Restriction of use of OSHA appropriations in specific enforcement programs (such as the Johnston amendment barring enforcement of the cotton dust standard which passed the Senate in 1978).

-- Increasing number of employer contests of OSHA citations in bad faith for the sole purpose of delaying necessary expenditures.

-- Increasing court challenges to newly-issued safety and health standards.

-- Challenge to OSHA's "right of entry " into a workplace.

-- Establishment of exclusionary hiring and promotional policies which discriminate against women, racial minorities and disabled workers, rather than correcting hazards in question.

S-2153 would only continue this attack, and inflict deep, if not fatal wounds into OSHA's effectiveness as the defender of the human right of workers to a safe workplace environment. It would cripple the agency by imposing unbearable administrative requirements, and return us to the Dark Ages of state enforcement when government safety inspectors counted bodies rather than violations.

Recently, our members have been told that their leaders are wrong about S-2153, that it is a genuine attempt to improve worker safety, and that claims to the contrary are simply election-year politicking. To those who make such statements, I suggest that I and the other officers of ACTWU were elected by our members to represent their interests, and that anyone actively supporting S-2153 couldn't win an election for shop steward in one of our local unions.

However, if electioneering is the issue at hand, I must ask the members of the Committee:

Why is the Committee in such a rush to act on this legislation?

Why are the legislative hearings being held so soon after the oversight hearings, when the record of those earlier hearings is not yet even completed?

Why are these hearings so short as to prevent rank-and-file workers from testifying as to the true conditions in the workplace?

Why doesn't the Committee hold hearings in Pittsburgh, Pa. and Greenville, S. C. to hear from the steelworkers and textile workers of this country in 1980, just as the Committee did in 1970?

What's the rush? If the answer is electioneering, as I repeat it is, then the shoe fits on those leveling those charges. The campaign on behalf of S-2153 represents a crass and callous capitulation to the hysterical atmosphere against government regulation now being created in the Congress. It is heartless, sinister and motivated by concerns for the health of America's corporate profit-centers rather than the safety of America's workers or the security of their families.

ACTWU and the entire trade union movement are committed to the defeat of this bill in total, and we assure its supporters and this Committee we shall not rest until we accomplish that defeat.

APPENDICES

I. ACTWU Local Union Safety and Health Action Manual.

II. "Brown Lung: A Case of Deadly Neglect", Charlotte Observer, Feb. 3-10, 1980.

III. Letter from Eric Frumin to Robert Wendell re: Complaint Against State Plan Administration (CASPA -- North Carolina, March 1, 1980.

IV. Letter from Matt Gillen to David Rhone re: Complaint Against the Administration of the Virginia State Plan, January 15, 1980 with 4 attachments.

V. Letter from David Rhone to Commissioner Beard, March 10, 1980.

VI. Letter from David Rhone to Eric Frumin, March 27, 1980.

VII. Safety Representatives and Safety Committees Regulations 1977, Secretary of State for Employment (United Kingdom), 1977.

APPENDIX VII

STATUTORY INSTRUMENTS

1977 No. 500

HEALTH AND SAFETY

The Safety Representatives and Safety Committees Regulations 1977

Made - - - -	*16th March* 1977
Laid before Parliament	*28th March* 1977
Coming into Operation	*1st October* 1978

Whereas the Health and Safety Commission has submitted to the Secretary of State, under section 11(2)(*d*) of the Health and Safety at Work etc. Act 1974(a) ("the 1974 Act") as amended by paragraph 4 of Schedule 15 to the Employment Protection Act 1975(b) ("the 1975 Act"), proposals for the making of Regulations after the carrying out by the said Commission of consultations in accordance with section 50(3) of the 1974 Act as amended by paragraph 16(3) of Schedule 15 to the 1975 Act;

And whereas the Secretary of State has made modifications to the said proposals under section 50(1) of the 1974 Act and has consulted the said Commission thereon in accordance with section 50(2) of the 1974 Act, both of which provisions have been amended by paragraph 16 of Schedule 15 to the 1975 Act;

And whereas under section 80(1) of the 1974 Act it appears to the Secretary of State that the modification of paragraph 16 of Schedule 1 to the Trade Union and Labour Relations Act 1974(c) made in Regulation 11(5) below is expedient in connection with the provision made by Regulation 4(2) below and, in accordance with section 80(4) of the 1974 Act as substituted by paragraph 19 of Schedule 15 to the 1975 Act, he has consulted such bodies as appeared to him to be appropriate on the proposed modification;

Now therefore, the Secretary of State, in exercise of the powers conferred on him by section 2(4) and (7), 15(1), (3)(*b*) and (5)(*b*), 80(1) and (4) and 82(3)(*a*) of the 1974 Act as amended by paragraphs 2, 6 and 19 of Schedule 15 to the 1975 Act and of all other powers enabling him in that behalf and so as to give effect to the said proposals of the said Commission (with the said modifications) and so as to modify the said provision in the Trade Union and Labour Relations Act 1974, hereby makes the following Regulations:—

Citation and commencement

1. These Regulations may be cited as the Safety Representatives and Safety Committees Regulations 1977 and shall come into operation on 1st October 1978.

(a) 1974 c. 37. (b) 1975 c. 71. (c) 1974 c. 52.

Interpretation

2.—(1) In these Regulations, unless the context otherwise requires—

"the 1974 Act" means the Health and Safety at Work etc. Act 1974 as amended by the 1975 Act;

"the 1975 Act" means the Employment Protection Act 1975;

"employee" has the meaning assigned by section 53(1) of the 1974 Act and "employer" shall be construed accordingly;

"recognised trade union" means an independent trade union as defined in section 30(1) of the Trade Union and Labour Relations Act 1974 which the employer concerned recognises for the purpose of negotiations relating to or connected with one or more of the matters specified in section 29(1) of that Act in relation to persons employed by him or as to which the Advisory, Conciliation and Arbitration Service has made a recommendation for recognition under the 1975 Act which is operative within the meaning of section 15 of that Act;

"safety representative" means a person appointed under Regulation 3(1) of these Regulations to be a safety representative;

"welfare at work" means those aspects of welfare at work which are the subject of health and safety regulations or of any of the existing statutory provisions within the meaning of section 53(1) of the 1974 Act;

"workplace" in relation to a safety representative means any place or places where the group or groups of employees he is appointed to represent are likely to work or which they are likely to frequent in the course of their employment or incidentally to it.

(2) The Interpretation Act 1889(a) shall apply to the interpretation of these Regulations as it applies to the interpretation of an Act of Parliament.

(3) These Regulations shall not be construed as giving any person a right to inspect any place, article, substance or document which is the subject of restrictions on the grounds of national security unless he satisfies any test or requirement imposed on those grounds by or on behalf of the Crown.

Appointment of safety representatives

3.—(1) For the purposes of section 2(4) of the 1974 Act, a recognised trade union may appoint safety representatives from amongst the employees in all cases where one or more employees are employed by an employer by whom it is recognised, except in the case of employees employed in a mine within the meaning of section 180 of the Mines and Quarries Act 1954(b) which is a coal mine.

(2) Where the employer has been notified in writing by or on behalf of a trade union of the names of the persons appointed as safety representatives under this Regulation and the group or groups of employees they represent, each such safety representative shall have the functions set out in Regulation 4 below.

(3) A person shall cease to be a safety representative for the purposes of these Regulations when—

(*a*) the trade union which appointed him notifies the employer in writing that his appointment has been terminated; or

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(a) 1889 c. 63.

(b) 1954 c. 70.

(*b*) he ceases to be employed at the workplace but if he was appointed to represent employees at more than one workplace he shall not cease by virtue of this sub-paragraph to be a safety representative so long as he continues to be employed at any one of them; or

(*c*) he resigns.

(4) A person appointed under paragraph (1) above as a safety representative shall so far as is reasonably practicable either have been employed by his employer throughout the preceding two years or have had at least two years experience in similar employment.

Functions of safety representatives

4.—(1) In addition to his function under section 2(4) of the 1974 Act to represent the employees in consultations with the employer under section 2(6) of the 1974 Act (which requires every employer to consult safety representatives with a view to the making and maintenance of arrangements which will enable him and his employees to cooperate effectively in promoting and developing measures to ensure the health and safety at work of the employees and in checking the effectiveness of such measures), each safety representative shall have the following functions:—

(*a*) to investigate potential hazards and dangerous occurrences at the workplace (whether or not they are drawn to his attention by the employees he represents) and to examine the causes of accidents at the workplace;

(*b*) to investigate complaints by any employee he represents relating to that employee's health, safety or welfare at work;

(*c*) to make representations to the employer on matters arising out of sub-paragraphs (*a*) and (*b*) above;

(*d*) to make representations to the employer on general matters affecting the health, safety or welfare at work of the employees at the workplace;

(*e*) to carry out inspections in accordance with Regulations 5, 6 and 7 below;

(*f*) to represent the employees he was appointed to represent in consultations at the workplace with inspectors of the Health and Safety Executive and of any other enforcing authority;

(*g*) to receive information from inspectors in accordance with section 28(8) of the 1974 Act; and

(*h*) to attend meetings of safety committees where he attends in his capacity as a safety representative in connection with any of the above functions;

but, without prejudice to sections 7 and 8 of the 1974 Act, no function given to a safety representative by this paragraph shall be construed as imposing any duty on him.

(2) An employer shall permit a safety representative to take such time off with pay during the employee's working hours as shall be necessary for the purposes of—

(*a*) performing his functions under section 2(4) of the 1974 Act and paragraph (1)(*a*) to (*h*) above;

(*b*) undergoing such training in aspects of those functions as may be reasonable in all the circumstances having regard to any relevant provisions of a code of practice relating to time off for training approved for the time being by the Health and Safety Commission under section 16 of the 1974 Act.

In this paragraph "with pay" means with pay in accordance with the Schedule to these Regulations.

Inspections of the workplace

5.—(1) Safety representatives shall be entitled to inspect the workplace or a part of it if they have given the employer or his representative reasonable notice in writing of their intention to do so and have not inspected it, or that part of it, as the case may be, in the previous three months; and may carry out more frequent inspections by agreement with the employer.

(2) Where there has been a substantial change in the conditions of work (whether because of the introduction of new machinery or otherwise) or new information has been published by the Health and Safety Commission or the Health and Safety Executive relevant to the hazards of the workplace since the last inspection under this Regulation, the safety representatives after consultation with the employer shall be entitled to carry out a further inspection of the part of the workplace concerned notwithstanding that three months have not elapsed since the last inspection.

(3) The employer shall provide such facilities and assistance as the safety representatives may reasonably require (including facilities for independent investigation by them and private discussion with the employees) for the purpose of carrying out an inspection under this Regulation, but nothing in this paragraph shall preclude the employer or his representative from being present in the workplace during the inspection.

(4) An inspection carried out under section 123 of the Mines and Quarries Act 1954 shall count as an inspection under this Regulation.

Inspections following notifiable accidents, occurrences and diseases

6.—(1) Where there has been a notifiable accident or dangerous occurrence in a workplace or a notifiable disease has been contracted there and—

(*a*) it is safe for an inspection to be carried out; and

(*b*) the interests of employees in the group or groups which safety representatives are appointed to represent might be involved,

those safety representatives may carry out an inspection of the part of the workplace concerned and so far as is necessary for the purpose of determining the cause they may inspect any other part of the workplace; where it is reasonably practicable to do so they shall notify the employer or his representative of their intention to carry out the inspection.

(2) The employer shall provide such facilities and assistance as the safety representatives may reasonably require (including facilities for independent investigation by them and private discussion with the employees) for the purpose of carrying out an inspection under this Regulation; but nothing in this paragraph shall preclude the employer or his representative from being present in the workplace during the inspection.

(3) In this Regulation "notifiable accident or dangerous occurrence" and "notifiable disease" mean any accident, dangerous occurrence or disease, as the case may be, notice of which is required to be given by virtue of any of the relevant statutory provisions within the meaning of section 53(1) of the 1974 Act.

Inspection of documents and provision of information

7.—(1) Safety representatives shall for the performance of their functions under section 2(4) of the 1974 Act and under these Regulations, if they have given the employer reasonable notice, be entitled to inspect and take copies of any document relevant to the workplace or to the employees the safety representatives represent which the employer is required to keep by virtue of any relevant statutory provision within the meaning of section 53(1) of the 1974 Act except a document consisting of or relating to any health record of an identifiable individual.

(2) An employer shall make available to safety representatives the information, within the employer's knowledge, necessary to enable them to fulfil their functions except—

(*a*) any information the disclosure of which would be against the interests of national security; or

(*b*) any information which he could not disclose without contravening a prohibition imposed by or under an enactment; or

(*c*) any information relating specifically to an individual, unless he has consented to its being disclosed; or

(*d*) any information the disclosure of which would, for reasons other than its effect on health, safety or welfare at work, cause substantial injury to the employer's undertaking or, where the information was supplied to him by some other person, to the undertaking of that other person; or

(*e*) any information obtained by the employer for the purpose of bringing, prosecuting or defending any legal proceedings.

(3) Paragraph (2) above does not require an employer to produce or allow inspection of any document or part of a document which is not related to health, safety or welfare.

Cases where safety representatives need not be employees

8.—(1) In the cases mentioned in paragraph (2) below safety representatives appointed under Regulation 3(1) of these Regulations need not be employees of the employer concerned; and section 2(4) of the 1974 Act shall be modified accordingly.

(2) The said cases are those in which the employees in the group or groups the safety representatives are appointed to represent are members of the British Actors' Equity Association or of the Musicians' Union.

(3) Regulations 3(3)(*b*) and (4) and 4(2) of these Regulations shall not apply to safety representatives appointed by virtue of this Regulation and in the case of safety representatives to be so appointed Regulation 3(1) shall have effect as if the works "from amongst the employees" were omitted.

Safety committees

9.—(1) For the purposes of section 2(7) of the 1974 Act (which requires an employer in prescribed cases to establish a safety committee if requested to do so by safety representatives) the prescribed cases shall be any cases in which at least two safety representatives request the employer in writing to establish a safety committee.

(2) Where an employer is requested to establish a safety committee in a case prescribed in paragraph (1) above, he shall establish it in accordance with the following provisions—

(*a*) he shall consult with the safety representatives who made the request and with the representatives of recognised trade unions whose members work in any workplace in respect of which he proposes that the committee should function;

(*b*) the employer shall post a notice stating the composition of the committee and the workplace or workplaces to be covered by it in a place where it may be easily read by the employees;

(*c*) the committee shall be established not later than three months after the request for it.

Power of Health and Safety Commission to grant exemptions

10. The Health and Safety Commission may grant exemptions from any requirement imposed by these Regulations and any such exemption may be unconditional or subject to such conditions as the Commission may impose and may be with or without a limit of time.

Provisions as to industrial tribunals

11.—(1) A safety representative may, in accordance with the jurisdiction conferred on industrial tribunals by paragraph 16(2) of Schedule 1 to the Trade Union and Labour Relations Act 1974, present a complaint to an industrial tribunal that—

(*a*) the employer has failed to permit him to take time off in accordance with Regulation 4(2) of these Regulations; or

(*b*) the employer has failed to pay him in accordance with Regulation 4(2) of and the Schedule to these Regulations.

(2) An industrial tribunal shall not consider a complaint under paragraph (1) above unless it is presented within three months of the date when the failure occurred or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within the period of three months.

(3) Where an industrial tribunal finds a complaint under paragraph (1)(*a*) above well-founded the tribunal shall make a declaration to that effect and may make an award of compensation to be paid by the employer to the employee which shall be of such amount as the tribunal considers just and equitable in all the circumstances having regard to the employer's default in failing to permit time off to be taken by the employee and to any loss sustained by the employee which is attributable to the matters complained of.

(4) Where on a complaint under paragraph (1)(*b*) above an industrial tribunal finds that the employer has failed to pay the employee the whole or part of the amount required to be paid under paragraph (1)(*b*), the tribunal shall order the employer to pay the employee the amount which it finds due to him.

(5) Paragraph 16 of Schedule 1 to the Trade Union and Labour Relations Act 1974 (jurisdiction of industrial tribunals) shall be modified by adding the following sub-paragraph:—

> "(2) An industrial tribunal shall have jurisdiction to determine complaints relating to time off with pay for safety representatives appointed under regulations made under the Health and Safety at Work etc. Act 1974".

Albert Booth,

16th March 1977.

Secretary of State for Employment.

Regulation 4(2)

SCHEDULE

Pay for time off allowed to safety representatives

1. Subject to paragraph 3 below, where a safety representative is permitted to take time off in accordance with Regulation 4(2) of these Regulations, his employer shall pay him—

(*a*) where the safety representative's remuneration for the work he would ordinarily have been doing during that time does not vary with the amount of work done, as if he had worked at that work for the whole of that time;

(*b*) where the safety representative's remuneration for that work varies with the amount of work done, an amount calculated by reference to the average hourly earnings for that work (ascertained in accordance with paragraph 2 below).

2. The average hourly earnings referred to in paragraph 1(*b*) above are the average hourly earnings of the safety representative concerned or, if no fair estimate can be made of those earnings, the average hourly earnings for work of that description of persons in comparable employment with the same employer or, if there are no such persons, a figure of average hourly earnings which is reasonable in the circumstances.

3. Any payment to a safety representative by an employer in respect of a period of time off-

(*a*) if it is a payment which discharges any liability which the employer may have under section 57 of the 1975 Act in respect of that period, shall also discharge his liability in respect of the same period under Regulation 4(2) of these Regulations;—

(*b*) if it is a payment under any contractual obligation, shall go towards discharging the employer's liability in respect of the same period under Regulation 4(2) of these Regulations;

(*c*) if it is a payment under Regulation 4(2) of these Regulations shall go towards discharging any liability of the employer to pay contractual remuneration in respect of the same period.

EXPLANATORY NOTE

(This Note is not part of the Regulations.)

These Regulations give effect with modifications to proposals of the Health and Safety Commission submitted to the Secretary of State:—

(*a*) providing for the appointment of safety representatives and prescribing their functions in relation to the employees they represent and their workplaces;

(*b*) providing for time off with pay for safety representatives in order that they may perform their functions and undergo training in aspects of those functions; and

(*c*) providing the cases in which it is the duty of employers to establish safety committees in accordance with the Regulations.

The Regulations also modify Part III of Schedule 1 to the Trade Union and Labour Relations Act 1974 so as to extend the jurisdiction of industrial tribunals to enable them to deal with complaints by safety representatives relating to time off with pay.

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SUMMARY STATEMENT

of

JACOB SHEINKMAN, SECRETARY TREASURER

AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO

before the

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

LEGISLATIVE HEARINGS

on

S-2153

Washington, D. C.

April 25, 1980

INTRODUCTION

My name is Jacob Sheinkman. I am the Secretary-Treasurer of the Amalgamated Clothing and Textile Workers Union, AFL-CIO, which represents a half-million workers in the men's clothing, textile, shoe and other soft-goods industries in the United States and Canada. Appearing with me today is Eric Frumin, the Acting Director of our Department of Occupational Safety and Health. ACTWU appreciates being given the opportunity to testify today on S-2153. It is a matter of utmost concern to the officers and members of ACTWU, as well as to workers throughout the nation.

ACTWU opposes S-2153, both as it stands and in any amended form. It is an anti-people piece of legislation, and represents an unhealthy trend in the changing political ethic in our society. It runs counter to the basic democratic principles of our society as well as our long-standing national commitment to protect the welfare of the citizenry. We seek to convince the members of the Committee that this bill should be rejected entirely, and that passage of any such legislation amending the Occupational Safety and Health Act at this time would be a disaster for American workers.

I will not attempt to describe in this short time all of our objections to S-2153. They are described in detail in our written submission. However, the entire thrust of the bill to exempt so-called "safe" workplaces can only have one result -- force workers to suffer death or serious injury before action is taken to prevent further injury. This is simply unacceptable in a civilized society.

What if one were to apply the same principle to the administration of our criminal justice system? How many people would have to be killed or beaten before police would make arrests in a "safe" community? Workers are being killed and beaten on the job every day by the thousands, and they deserve as much protection inside the plant gates as outside. S-2153 would legalize a second class of citizenry, and that is a frightening prospect for our society as a whole.

The proposed legislation is only one of many continuing and mounting attacks on worker rights generated by Big Business and its supporters in the Congress. We have seen this most recently on consumer protection, labor law reform and minimum wages. In the specific area of worker safety such attacks have viciously attempted --and often succeeded-- in putting workers at "increased risk of material impairment of health or safety" by:

-- Restriction of use of OSHA appropriations in specific enforcement programs (such as the Johnston amendment barring enforcement of the cotton dust standard which passed the Senate in 1978).

-- Increasing number of employer contests of OSHA citations in bad faith for the sole purpose of delaying necessary expenditures.

-- Increasing court challenges to newly-issued safety and health standards.

-- Challenge to OSHA's "right of entry " into a workplace.

-- Establishment of exclusionary hiring and promotional policies which discriminate against women, racial minorities and disabled workers, rather than correcting hazards in question.

S-2153 would only continue this attack, and inflict deep, if not fatal wounds into OSHA's effectiveness as the defender of the human right of workers to a safe workplace environment. It would cripple the agency by imposing unbearable administrative requirements, and return us to the Dark Ages of state enforcement when government safety inspectors counted bodies rather than violations.

Recently, our members have been told that their leaders are wrong about S-2153, that it is a genuine attempt to improve worker safety, and that claims to the contrary are simply election-year politicking. To those who make such statements, I suggest that I and the other officers of ACTWU were elected by our members to represent their interests, and that anyone actively supporting S-2153 couldn't win an election for shop steward in one of our local unions.

However, if electioneering is the issue at hand, I must ask the members of the Committee:

Why is the Committee in such a rush to act on this legislation?

Why are the legislative hearings being held so soon after the oversight hearings, when the record of those earlier hearings is not yet even completed?

Why are these hearings so short as to prevent rank-and-file workers from testifying as to the true conditions in the workplace?

Why doesn't the Committee hold hearings in Pittsburgh, Pa. and Greenville, S.C. to hear from the steelworkers and textile workers of this country in 1980, just as the Committee did in 1970?

1-43/116

What's the rush? If the answer is electioneering, as I repeat it is, then the shoe fits on those leveling those charges. The campaign on behalf of S-2153 represents a crass and callous capitulation to the hysterical atmosphere against government regulation now being created in the Congress. It is heartless, sinister and motivated by concerns for the health of America's corporate profit-centers rather than the safety of America's workers or the security of their families.

ACTWU and the entire trade union movement are committed to the defeat of this bill in total, and we assure its supporters and this Committee we shall not rest until we accomplish that defeat.

The **Chairman**. Thank you, Mr. Sheinkman.

I have not had a chance to read your complete statement. I wonder if you would respond to written questions if, after further review of your full statement, there were some questions to be submitted to you.

Mr. **Sheinkman**. I will be glad to respond to them.

The **Chairman**. I have to indicate that we have been notified to be at a meeting on the crisis situation in Iran very shortly, so we would rather proceed with the written approach, if that is OK with you.

Mr. **Sheinkman**. Surely.

The **Chairman**. Fine.

Senator Schweiker?

Senator **Schweiker**. I have no questions.

Thank you.

The **Chairman**. Thank you.

Mr. Nolan W. Hancock, legislative director, Oil, Chemical & Atomic Workers International Union.

We appreciate your being here to give your statements and observations on the legislation before us, Mr. Hancock.

STATEMENT OF NOLAN W. HANCOCK, LEGISLATIVE DIRECTOR, OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, ACCOMPANIED BY DR. FRANK COLLINS, WASHINGTON OFFICE CONSULTANT; STEVE WODKA, INTERNATIONAL REPRESENTATIVE; AND BILLY CANIPE, MEMBER, LOCAL 3-770, MEMPHIS, TENN.

Mr. **Hancock**. Mr. Chairman, Senator Schweiker, my name is Nolan Hancock. I am the legislative director of the Oil, Chemical & Atomic Workers International Union. I am accompanied today by Dr. Frank Collins, our Washington office consultant; international representative, Steve Wodka; and Billy Canipe, a member of our Memphis, Tenn., Local 3-770.

Mr. Chairman, we deeply appreciate the opportunity to appear before you again today. We have previously submitted our statement to you, which lays out in detail our opposition to S. 2153, and we are ready to answer any questions that you and the other committee members would have.

We would ask that our statement be included in the hearing record.

The **Chairman**. It certainly will be.

Mr. **Hancock**. However, before we get to the questions, we would like the committee to hear from Mr. Billy Canipe. What happened to Billy Canipe symbolizes the concern that we have about S. 2153. The bill will take away the right of every working American to a safe workplace.

S. 2153 explicitly allows every workplace to have up to two serious injuries that result in lost workday cases per every 100 workers per year. In other words, this bill would sanction serious injury, even crippling injury, to a certain number of American workers every year.

While we have talked and testified about this issue extensively in the last few months, we thought perhaps the most meaningful testimony would come from a worker who has already suffered from the conditions that we fear will be the result of S. 2153.

Brother Canipe is a production worker at the Humko-Sheffield Chemical Co. in Memphis, Tenn. Humko is a division of the giant food manufacturer, the Kraft Corp.

On January 31, 1980, Brother Canipe was crippled for life in a serious accident at the plant. When we investigated Brother Canipe's accident, we came upon some information that should be of importance to this committee. We determined that if S. 2153 had been enacted, Brother Canipe's plant would have been exempt from scheduled OSHA safety inspections. In other words, the Humko plant is one of those nonhazardous workplaces that Senator Schweiker has been talking about.

In 1979, there were 345 workers employed at the Humko plant. Under S. 2153 exemption formula, this employer would have been allowed up to seven lost workday cases and still be exempt from scheduled OSHA safety inspections. In 1979, the Humko plant had five recorded lost workday cases, and therefore, would have qualified for the exemption in 1980 as a nonhazardous workplace.

Significantly, there were an additional nine serious injuries in the plant in 1979, but these cases were not recorded as lost workday cases because the employer was able to get these workers to come into work, even though these workers were still incapacitated.

We join with the many witnesses who have come forward and explained to this committee that lost workday cases are simply not an accurate, reliable method to determine the safeness of the workplace.

Lastly, let me add that as soon as we heard about Brother Canipe's accident, we filed a complaint with the Tennessee OSHA on behalf of the local union. The State OSHA program investigated and issued a serious general duty clause citation. The penalty was $280. This case is illustrative of our position that the current OSHA penalty system simply does not provide an incentive to employers to correct hazards before they kill or maim.

I would now turn to Brother Billy Canipe for any comments that he might have.

[The prepared statement of Mr. Hancock follows:]

STATEMENT OF NOLAN W. HANCOCK
CITIZENSHIP-LEGISLATIVE DIRECTOR
ACCOMPANIED BY STEVEN WODKA
INTERNATIONAL REPRESENTATIVE
AND BILLY CANIPE
MEMBER OF LOCAL 3-770
of the
OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION
before the
SENATE LABOR AND HUMAN RESOURCES COMMITTEE
on
S.2153 AND THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

April 16, 1980

The rank-and-file of the OCAW want the Occupational Safety and Health Act strengthened, not weakened. The legislative proposals before this Committee that would reduce the scope of OSHA have galvanized our membership like no other issue has in the last ten years. Our people perceive that just as an enlightened leadership at OSHA had begun to make the Act responsive to their needs, a serious Congressional attempt has been mounted to strike OSHA down. There are similarities between what happened to the Federal Trade Commission and what is proposed for OSHA. One major participant in the battle over the FTC observed: "It's okay to have an FTC that's a charade. But if it starts getting serious, cut its neck off." The "cutting" of OSHA is precisely what this bill is about.

S. 2153 is operating under the guise that it would "improve" OSHA. Nothing could be further from the truth. In our testimony on OSHA oversight, which we delivered before this Committee on March 28, 1980, we agreed that there had not been a dramatic drop off in the injury and death rate in the oil refining and chemical industries. The underlying reasons for this lack of a reduction and how they could be attacked are not at all addressed by S.2153.

We observed that our current system of health and safety regulation does not provide an economic incentive for employers in the oil and chemical industries to correct unsafe conditions before they kill or maim. In fact, as we demonstrated in that testimony, it pays for an employer not to correct those conditions that killed or maimed even after he has been cited by OSHA. The citation review process encourages employers to appeal. Such appeals automatically stay the required correction of the hazard that killed or maimed. The full appeal process can take an average of three years. We pointed out that many important citations issued by Dr. Bingham early in her administration in 1977 are now just being affirmed.

We proposed several remedies in our oversight testimony. The first would be to make the citation review process and the anti-discrimination procedures under OSHA consistent with the Mine Safety and Health Amendments Act of 1977. We also proposed a new penalty system whereby fines for non-compliance would precisely equal the economic benefits gained by that employer by his not complying. We made it clear, however, that any compromise that would graft some of our proposals on to a revised S.2153 was absolutely unacceptable.

We conducted an extensive study of how S.2153 would impact on the membership of the OCAW. We were frankly surprised by the results. Far from just exempting mom-and-pop grocery stores and low-hazard service industries from scheduled safety inspections, we found that S.2153 would exempt oil refineries and chemical plants that had blown up and killed workers in the years surrounding the base year of qualification for the exemption. In essence, we determined that the bill's exemption formula, that would allow 2 lost workday cases per 100 employees per year, does not define a safe place to work.

In order to make this study, we asked OSHA, pursuant to the Freedom of Information Act, to tell us which OCAW represented plants would be exempt under S.2153. From January, 1977 to April, 1979, Federal OSHA had recorded the lost workday case and fatality rate on each employer for the previous calendar year when it performed an inspection. The same data from the twenty-two states where there is a state OSHA enforcement agency was not available to Federal OSHA when this study was made.

The results of our study can be found in the attachment to this statement. We have provided the name of the employer, location, number of workers at that location and the base year. The base year is the year in which the employer had up to the permissible number of lost workday cases and no fatalities. Under S.2153, a plant would be exempt from scheduled OSHA safety inspections in the year following the base year. Again, it must be emphasized that this is only a partial list. Data from state plans is not included. Further, a plant would have to have been inspected between January, 1977 and April, 1979 in order to have been included.

Nonetheless, we were surprised at the extent of workplaces potentially exempted: 82 workplaces covering 54,468 workers (nearly 1/3 of the OCAW's total membership).

But what concerned us even more was the kind of workplace that would be exempt. The following examples are indicative of the real safety hazards that abound in these exempt plants.

In OCAW District 2, the Sinclair Oil refinery in Sinclair, Wyoming would have been exempt in 1978. On November 7, 1978 a worker was gassed and killed by hydrogen sulphide. This points up another problem with S.2153. Where is the line drawn between safety hazards and health hazards? (Health hazards are not exempt from scheduled inspections under S.2153.) Is to be gassed by hydrogen sulphide a safety or a health hazard? S.2153 would cause enormous confusion in these types of cases.

In OCAW District 3, incredibly, explosives manufacturing plants would be exempt. One of these plants would be the Radford Army Ammunition plant operated by Hercules, Inc. in Radford, Virginia. Here is the sorry record of this plant:

1970 - 2 workers killed
1971 - 2 workers killed
1974 - 100 workers seriously injured
1977 - base year under S.2153
1978 - 2 workers killed and 10 workers seriously injured.

The Radford plant's allegedly "good" record in 1977 was no indicator of what was to come in 1978.

Another explosives plant operated by Hercules in Bessemer, Alabama would have been exempt in 1977. On October 31, 1979 one worker was killed and four injured in an explosion.

In OCAW District 4 there are additional examples of how the exemption formula can not predict a safe workplace.

Based on its 1977 record, the Denka Chemical Company in Houston, Texas would have been exempt from scheduled safety inspections in

1978. On November 3, 1978 an explosion and fire occurred in the polymer building. Three workers were killed and 23 were injured. This tragedy was entirely preventable because the company had cut back on preventive maintenance on instrumentation that would have warned the workers of the pending disaster had the equipment been working properly.

At the Amoco Texas Refinery in Texas City, Texas, which would have been exempt in 1977, one worker was killed in a flash fire in 1979 and several were burned. In 1980, another 2 workers were killed in a fire at this plant.

At the Continental Oil Company in Westlake, Louisiana a cloud of phosgene gas drifted over the refinery on March 14, 1978, the year in which it would have been exempt. Many workers were overcome by the gas. OSHA cited the employer under the general duty clause for failure to have an adequate emergency evacuation plan. Only a month ago the Review Commission affirmed the citation. Again, was this gassing a safety hazard or health hazard?

In 1977 the BASF Wyandotte chemical plant in Geismar, Louisiana had a supposedly good record that would have exempted it from scheduled safety inspections in 1978. On September 18, 1978 a worker was electrocuted and killed when he came in contact with an unguarded live electrical wall of an electrolytic cell. A simple barrier between the work area and cell wall would have prevented that worker's death. OSHA appropriately cited the employer and BASF contested. This case is still on appeal to the Review Commission and a barrier between the work area and the live cell wall still has not been installed.

Moving to OCAW District 7, in 1978 an explosion killed two workers and injured several others at the EPN processing unit at the Stauffer Chemical plant in Chicago Heights, Illinois which would have been exempt in 1977. While the safety inspectors were investigating the explosion, they brought to the Union's attention information about health hazards caused by exposure to EPN, which is an insecticide. It is important to note that in 1979, OSHA safety inspectors made more than 1300 referrals to industrial hygiene inspectors for possible violations of OSHA health standards that were found during safety inspections. Based on our experience, there is no question that S.2153 would dilute OSHA's effectiveness against health hazards.

In OCAW District 8, on April 17, 1978 a worker was gassed by hydrogen sulphide and killed at the BP oil refinery in Marcus Hook, Pennsylvania. This refinery would have been exempt in 1978.

At another refinery in Marcus Hook, Sun Petroleum Products Company, 2 workers died in a fire in 1976. In 1977, Sun supposedly had a good year under S.2153 and would have been exempt the following year. On January 28, 1978 an underground cavern for storage of natural gas was overfilled which caused highly explosive gas to leak into the basements of homes surrounding the refinery. The workers inside the refinery were equally endangered. In 1979, two workers were seriously burned in a flash fire at the refinery.

In summary, lost workday case data is not indicative of a safe workplace in the oil and chemical industry. These plants will go through unpredictable peaks of fatal fires, explosions and accidents and then lulls of relatively "safe" operation. Because of the unpredictable nature of these facilities, there are no statistical means to reliably separate "safe" operations from "unsafe" operations. For example, extending the period of time for the base for the exemption to two or three years would still leave unsafe workplaces exempted.

One major reason for this unpredictability of safeness in the oil and chemical industry is the calculated risk factor. Plants are designed and maintained on a risk basis. For example, a unit is run for three years continuously without a major overhaul based on management's calculation that no critical component will break down during that period of time. We say these are calculated risks because the increasing possibility of a breakdown is balanced against the profitability of continued operation. When a unit is not operating, it is not making any money. The closer that a company is willing to shave the safety margin and take a greater risk, the higher the profitability. As we stated in our oversight testimony, OSHA's maximum fines of $1000 or $10,000 are pocket change when compared to the amount of money to be made by utilizing the calculated risk. When management guesses wrong, explosions and fires occur. But the workers end up paying the highest price.

Because the current penalty system is inadequate, we also contend that the reduction in fines proposed by S.2153 is a step backwards. Because most major oil companies have joint labor-management safety committees and usually employ a safety or health consultant, almost all of the major companies would qualify for the $700 limit for serious violations. The idea of giving the oil companies a reduction in penalties for serious safety violations, regardless of their records, will only serve to further undermine any potential deterrent factor that the Act currently possesses.

The last major point that we wish to cover involves the interference by S.2153 with the worker's right to file a complaint. In our view this is the most grievous provision of this bill. In the OCAW, we do not wait for OSHA to conduct a scheduled safety inspection of a plant where there are hazards. If a local union knows of serious safety hazards that it has been unable to get correction of by going first to management, the International Union then encourages the local to file a complaint with OSHA. We further encourage the locals to file their complaint through the OCAW Washington office. In this manner we can insure that the complaint is acted upon properly and promptly. Since 1971, we have filed several hundred complaints in this manner. From this experience, we have learned that the right to file a complaint and receive a prompt inspection forms the thin blue line in a plant that protects workers from rampant disregard for their safety.

All complaints from our Washington office are always signed, formal complaints that specifically list the hazardous conditions and where they can be found in the plant. But even these substantial complaints would be affected by S.2153. This bill would require OSHA, upon receipt of the complaint, to notify the employer of the hazard complained about and then seek "satisfactory assurances" that the hazard would be corrected. It is important to keep in mind that the complaints we file are about hazards that have already been brought to management's attention by the local, but to no avail. Most employers will give OSHA such "satisfactory assurances" in order to keep OSHA out. We believe that OSHA could not do anything until the period of time for abatement for such "assurances" has expired.

This provision will only act to further cripple the effectiveness of the inspection process which is already hurting due to the need for warrants under the Barlow decision. Disputes will arise as to what conditions are imminent dangers which are not affected by this provision. Other disputes will arise as to whether a violation is a safety or health hazard, as to what was the extent of the satisfactory assurances, and as to the ability of OSHA to conduct inspections to check on whether the employer is implementing the abatement that he promised. In sum, the result will be an incredible bureaucratic and legal tangle everytime a complaint is filed and especially when the employer demands a warrant. We predict the injury and death rate will climb as a result.

Illustrative of the impact of this provision can be seen at the Texaco oil refinery in Lockport, Illinois. It employs 660 workers and has a throughput of 78,000 barrels per day. Under S.2153, a plant with 660 workers is allowed up to 20 lost workday injuries per year (and no workplace deaths). In 1978 the Lockport refinery had no deaths and 12 lost workday cases and would therefore be exempt in 1979.

However, the local union has been highly concerned about several serious safety hazards which have the potential to cause a disaster in the plant. These hazards include the company's reassignment of gas testing duties from instrument men to operators, lack of alarm systems to detect deadly hydrogen sulphide gas, and the company's failure to provide a second worker as a "buddy" when hazardous work is performed.

The change in gas testing assignments is of particular importance in an oil refinery. If gas testing is not performed properly, hot work in a gassy area can easily cause a fatal explosion and fire. At the Lockport refinery, gas testing had been performed by instrument men who were extensively trained. Texaco reassigned these duties to the operators who had received only a few hours training in gas testing and who had a competing responsibility with their operating duties. The local grieved the reassignment, arbitrated the issue, and lost. Then the local, through the International Union, filed a complaint with OSHA.

OSHA came into the plant without delay, inspected, and upheld the Union's complaint by issuing five serious citations in December, 1979 that covered the improper gas testing, the failure to have hydrogen sulphide alarms, and the lack of a "buddy" system. Fines of $3440 were proposed. The citations will significantly improve safety at the plant. Texaco, of course, has contested the citations and the hazards remain unabated.

Had S.2153 been law, Texaco:

1) would have received advance notice from OSHA;

2) would have been able to block the entire inspection for months by claiming it was "working" on the problems and

3) would have received no fine at all, even if OSHA had eventually been allowed to inspect the plant and issue citations.

In sum, we ask this Committee to leave the Occupational Safety and Health Act alone. If the Committee is willing to fight for real improvements in OSHA that we outlined as necessary in our oversight testimony, then we will be there to assist you. Otherwise, our members seek your support in their efforts to defeat S.2153 and any similar retrogressive legislation.

PARTIAL LIST OF EXEMPT OCAW WORKPLACES UNDER S. 2153

Local Union No.	Company	Base Year	Location	No. of Workers	SIC
District 2					
2-266	Sinclair Oil	1977	Sinclair, WY	183	2911
2-443	Farmers Union (Cenex)	1977	Laurel, MT	250	2911
2-470	Continental Oil Co.	1977	Billings, MT	180	2911
2-470	Exxon Co.	1976	Billings, MT	280	2911
2-483	Westco Refining Co.	1977	Cut Bank, MT	49	2911
2-632	J. R. Simplot Co.	1976	Pocatello, ID	550	2870
District 3					
3-495	Hercules, Inc. (RAAP)	1977	Radford, VA	2650	2892
3-562	Ciba-Geigy Corp.	1976	McIntosh, AL	1200	2879
3-586	Allied Chemical Corp.	1976	Moundsville, WV	640	2869
3-593	Stauffer Chemical Co.	1976	Axis, AL	200	2869
3-611	Borden, Inc.	1976	Chesapeake, VA	200	2874
3-632	Hocker Chemical Corp.	1976	Columbus, MS	109	2812
3-673	Amoco Oil Co.	1977	Savannah, GA	44	2911
3-679	Hercules, Inc.	1976	Bessemer, AL	175	2892
District 4					
4-23	American Petrofina Co.	'77 + '76	Port Arthur, TX	487	2911
4-23	Gulf Oil Co.	'77 + '76	Port Arthur, TX	3500	2911
4-227	Denka Chemical Co.	1977	Houston, TX	350	2822
4-227	Atlantic Richfield	'76 + '77 + '76	Houston, TX	1600	2911
4-228	B. F. Goodrich Chemical	1977	Port Neches, TX	700	2822
4-228	Texas-U.S. Chemical	1977	Port Neches, TX	620	2822
4-228	Jefferson Chemical	1976	Port Neches, TX	750	2865
4-228	Neches Butane	1977	Port Neches, TX	700	2911
4-243	Mobil Chemical	1977	Beaumont, TX	60	2851
4-367	Rohm & Haas	'76 + '77	Deer Park, TX	829	2865 + 2821
4-367	Olin Corp.	'77 + '76	Pasadena, TX	600	2874
4-367	Shell Oil & Chemical	'76 + '77	Deer Park, TX	3500	2899 + 2911
4-447	Witco Chemical	1976	Harvey, LA	150	2843
4-447	American Cyanamid	1976	Fortier, LA	456	2869
4-449	Amoco Texas Refining Co.	1976	Texas City, TX	1800	2911
4-500	Cities Service(polymer plant)	1977	Lake Charles, LA	990	2822
4-555	Conoco Chemical	1977	Lake Charles, LA	360	2865
4-555	Continental Oil Co.	1977	Westlake, LA	460	2911
4-620	Vulcan Materials Co.	1977	Geismar, LA	200	2821
4-620	BASF Wyandotte Corp.	1977	Geismar, LA	800	2812
4-750	Shell Oil	1977	Norco, LA	1300	2911
4-786	IMC Chemical	1976	Sterlington, LA	467	2819
4-836	Firestone Syn. Rubber	1976	Orange, TX	700	2822
District 5					
5-152	NL Industries, Inc.	1976	St. Louis, MO	150	2851
5-241	Getty Refining	'76 + '77 + '78	El Dorado, KS	517	2911
5-246	Mobil Oil	1977	Augusta, KS	300	2911

Local Union No.	Company	Base Year	Location	No. of Workers	SIC
District 5 (Cont'd)					
5-379	Stauffer Chemical Co.	1976	No. Little Rock, AR	33	2879 + 2819
5-434	Arkansas Chemicals, Inc.	1977	El Dorado, AR	25	2819
5-797	Sun Pet. Prod.	1977	Duncan, OK	312	2911
District 7					
7-176	Parke-Davis & Co.	1975	Detroit, MI	3000	2834
7-210	Ashland Chemical Co.	1977	Calumet City, IL	60	2821
7-210	Energy Coop.	1976	E. Chicago, IN	760	2911
7-222	Texaco, Inc.	'78 + '77	Lockport, IL	700	2911
7-346	Gulf Oil	'75 + '76	Toledo, OH	240	2911
7-346	Sohio	'78 +'77 + '76	Toledo, OH	575	2911
7-346	Union Oil	1976	Toledo, OH	26	2911
7-450	Ashland Oil	1976	Canton, OH	260	2911
7-507	CPC Int. (Corn Prod.)	1976	Argo, IL	1600	2046
7-507	Witco Chemical	1976	Chicago, IL	400	2869
7-517	Union Oil	1976	Lemont, IL	655	2911
7-581	IMC Chemical	'76 + '77	Wolf Lake, IL	170	2892
7-624	Sohio	1977	Lima, OH	590	2911
7-627	BASF Wyandotte	1976	Wyandotte, MI	2400	2812
7-765	Stauffer Chemical	1976	Chicago Hts., IL	460	2833
7-776	Amoco Oil	1977	Wood River, IL	620	2911
7-807	Ashland Chemical	1976	Mapleton, IL	285	2899 + 2890
7-912	Sun Pet. Prod.	'75 + '76	Toledo, OH	611	2911
District 8					
8-77	Olin Chemical	1977	Niagara Falls, NY	363	2812
8-95	Harmon Color Corp.	1977	Hawthorne, NJ	350	2865
8-149	Air Products & Chemical	1976	Middlesex, NJ	35	2819
8-166	Allied Chemical	1977	Elizabeth, NJ	248	2819
8-234	BP Oil	1977	Marcus Hook, PA	750	2911
8-280	Mobay Chem.- Verona Dyestuff	'77	Bayonne, NJ	144	2865
8-406	NL Industries, Inc.	1977	Bayonne, NJ	188	2821
8-406	Crown Central Pet.	1977	Elizabeth, NJ	25	2911
8-417	Pope Chemical	1977	Paterson, NJ	57	2893
8-559	Givaudan Corp.	1976	Clifton, NJ	725	2860
8-575	Merck & Co.	'76 + '77	Rahway, NJ	3800	2833 + 2834
8-575	Tenneco Chemical	1976	Elizabeth, NJ	70	2869
8-712	General Color	1976	Newark, NJ	19	2819
8-729	J.T. Baker Chemical	'77 + '76	Phillipsburg, NJ	800	2869
8-845	R. T. Vanderbilt Chem.	1977	Bethel, CT	61	2833
8-890	Tenneco Chemical	1977	Burlington, NJ	275	2821
8-891	Union Carbide	1977	Bound Brook, NJ	1000	2820
8-898	Getty Refining	1977	Delaware City, DE	610	2911
8-901	Sun Pet. Prod.	1977	Marcus Hook, PA	1500	2911
8-956	Iamont Corp.	1977	Belvidere, NJ	100	2816
8-3660	NL Industries, Inc.	1977	Sayreville, NJ	450	2816

Total Number of Exempt Workplaces: 82
Total Number of Workers: 54,468

The **Chairman**. Mr. Canipe?

Mr. **Canipe**. On the morning of January 31, it was about 6, and we had run out of one type of product that we were running, one tank of oil. We were supposed to have a break at 5, but we ran on until 6, until we ran out.

The supervisor told us to get the machine cleaned up for the next product, even though we had not had a break or anything. So anyway, I started cleaning up rolls Nos. 1 and 2.

The first thing you do is you slosh up all the excess oil, which is about 200 degrees, with an air hose, and then up onto a flake-and-roll. The flake-and-roll is a giant roll that turns and goes around to a blade and is chipped off, that turns liquid chemical into a hard chemical. Then it falls into an auger.

So after I had finished sloshing up the pans, the next step was to clean the augers. They clean the augers by taking an air hose and you have to bend over and blow into the auger while it is running and move the product down with the auger, build it up where the auger blades will carry it down.

So that morning, I started blowing the auger out, and there is a long pin, about 3 or 4 inches long there at the end of the auger, about that far from the very end. The auger is about as long as from here to the end of the table down there. I bent over, and I started blowing the auger out. The product is real dusty and flakey, and when you are blowing it out, it blows all up on you, in your face, up in under your safety glasses—you cannot really see while you are blowing it. So this pin came around and it caught my wrist right here, and when it caught my wrist, I jerked back, and then it pulled me to my knees. Then it started to drag me, pulling me in it.

It pulled me about 6 feet before my arm came off. I was frightened—from the time it got ahold of me, I started hollering for somebody to turn the machine off. Up there, you work on a platform about 8, 9 feet off the floor. There are no turnoff switches or anything up there to turn the machine off. The only place you can turn the machine off is to go down a ladder, all the way across, from here to that wall—that is about the approximate distance—and there is an on-off switch over there to turn the machine off.

The machine caught my arm and grabbed me, and it pulled me in so far that it made cut places on my head where the auger was turning. Then my arm came off—I was fighting, trying to get away from it, and hollering all the time—and when my arm came off, I fell backward, out of it.

By that time, still nobody had gotten there. So anyway, I got myself up, and I started out to the ladder, and I went down the ladder and out into the main floor of the working area, where there was a coworker who got an old pair of pants and tied them up around my shoulder to help control the bleeding, and another fellow applied pressure to my neck to keep me from bleeding so bad.

Then I kept waiting for the ambulance and everything. The ambulance came and picked me up. They did a little bit—they took some stuff and wrapped it around the stump. They picked me up and carried me out to the ambulance, and then the ambulance driver went back to get my arm, because it was still up in the machine. They got the arm and put it in a box and brought it up.

Here is how the arm looks. It came off right along here, back through here. Anyway, they put it in a box and put me in the ambulance, and carried me to St. Joseph's Hospital in Memphis, and said there was not anything they could do except seal my arm up. And my wife inquired as to whether there wasn't any way they could put it back on or anything. And they happened to get in touch with a team of doctors at the Baptist Hospital, and they carried me over there, where they reattached it. The operation took 11 hours and 20 minutes.

Since I spent 26 days in the hospital, and then I got out, and now I have to go to the doctor quite a bit.

But the same machine, I know of four other people who have been caught in the machine and reported it to the supervisors. They were lucky; it tore the shirt sleeve off; one fellow got an air hose—people have gotten sticks stuck in it. There is no way to turn it off, so if you get hung in it, you had just better hold on and hope it doesn't pull you all the way through it.

The company takes the policy that they do not want to have anything to do with me. They will not talk to me or anything. I go out there, and they will turn and run the other way. They told the employees not to talk to me.

The people who work there—I have seen people there on crutches, I have seen people there with cuts and stuff, where they should have been off from work.

I myself, 2 years ago, received a cut on my hand, and the last thing the supervisor told me before I left that day was, "Be sure to come to work the next day," because he did not want to report a lost time accident. He said, "Even if I have to come get you, you be here at work."

Mr. **Wodka**. Senator and Mr. Chairman, I think that that last point that Billy makes is very important. We state in our testimony that there were nine additional serious injuries in that plant in 1979, but they were not recorded as lost workday cases. And one of the reasons is not simply a question of the employer even being dishonest. Under Tennessee law, you have to be out of work for 7 days before you can get workmen's compensation; in other words, you do not get it until the 8th day. The employer in this case told those workers that if they would come back to work and not report it as a lost workday case, he would pay them their regular, straight time salary, as long as they could just sit in the plant, sit on the bench, or sit in the locker room.

The average wage rate in the plant is $250 a week; under Tennessee compensation, the maximum benefit is $107 a week. So there is an economic incentive, even on the part of workers, not to have the case recorded as a lost workday case.

Again, our point is that lost workday case rates are not a reliable indicator of whether a workplace is safe or not. And I think Brother Canipe shows that clearly.

Mr. **Canipe**. My income went from close to $300 a week down to $107 a week, and the bill collectors, they do not care what you get, they want their money.

The **Chairman**. Could I just ask one question? In this operation, is there an OSHA standard that requires any different handling of that machine than the one that was the practice in the plant?

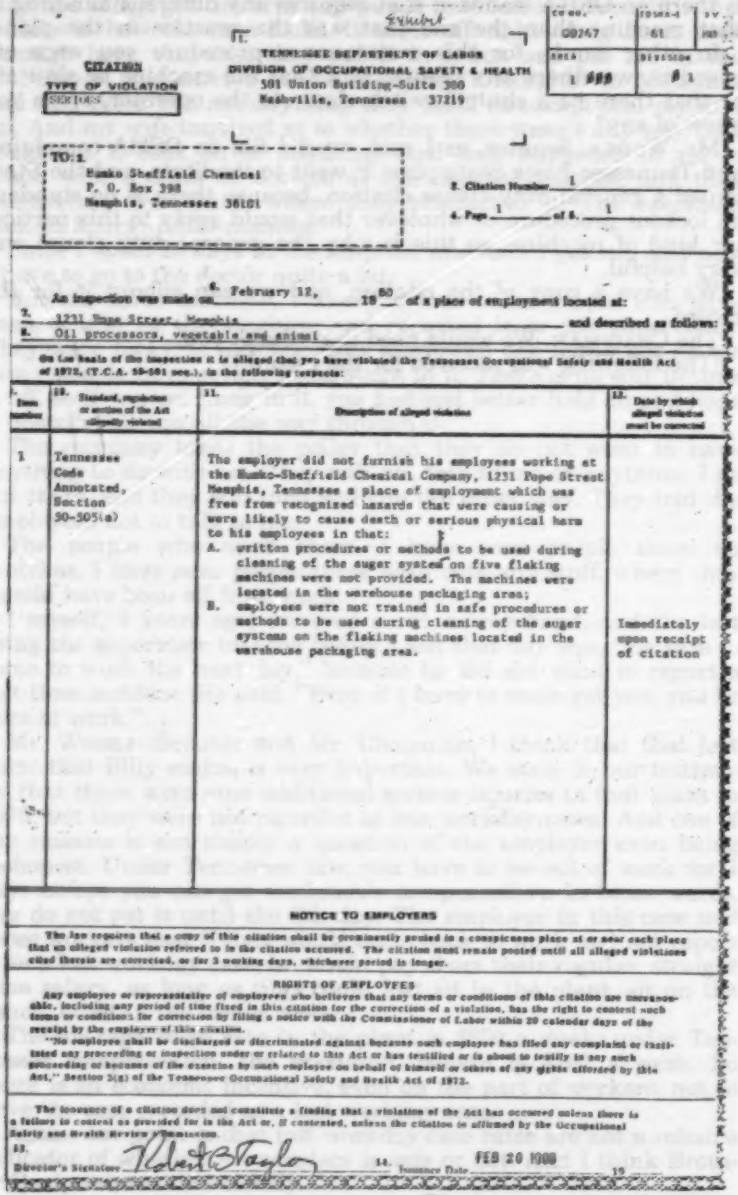
In other words, for this maintenance procedure you were engaged in, was there any requirement that the machine be shut off, or that there be a shutoff switch closer to the operator, or do you know of any?

Mr. **Wodka**. Senator, as I said, we did file an OSHA complaint, and Tennessee has a State plan; it went to the State, and the State issued a general duty clause citation, because there is no standard on lockout procedure or whatever that would apply to this particular kind of machine, so this is why the general duty clause was very helpful.

We have a copy of the citation, and we can submit it for the record.

The **Chairman**. We would need that, thank you.

[The following was received for the record:]



Exhibit

CO NO. 00247	61	
AREA 1 000	DIVISION 01	

1\.

TENNESSEE DEPARTMENT OF LABOR
DIVISION OF OCCUPATIONAL SAFETY & HEALTH
501 Union Building-Suite 300
Nashville, Tennessee 37219

CITATION

TYPE OF VIOLATION
SERIOUS

TO: 1.
Humko Sheffield Chemical
P. O. Box 398
Memphis, Tennessee 38101

2. Citation Number 1

4. Page 1 of 5. 1

An inspection was made on 6. February 12, 19 80 of a place of employment located at:

7. 1231 Pope Street, Memphis and described as follows:

8. Oil processors, vegetable and animal

On the basis of the inspection it is alleged that you have violated the Tennessee Occupational Safety and Health Act of 1972, (T.C.A. 50-501 seq.), in the following respects:

9. Item number	10. Standard, regulation or section of the Act allegedly violated	11. Description of alleged violation	12. Date by which alleged violation must be corrected
1	Tennessee Code Annotated, Section 50-505(a)	The employer did not furnish his employees working at the Humko-Sheffield Chemical Company, 1231 Pope Street Memphis, Tennessee a place of employment which was free from recognized hazards that were causing or were likely to cause death or serious physical harm to his employees in that: A. written procedures or methods to be used during cleaning of the auger system on five flaking machines were not provided. The machines were located in the warehouse packaging area; B. employees were not trained in safe procedures or methods to be used during cleaning of the auger systems on the flaking machines located in the warehouse packaging area.	Immediately upon receipt of citation

NOTICE TO EMPLOYERS

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near each place that an alleged violation referred to in the citation occurred. The citation must remain posted until all alleged violations cited therein are corrected, or for 3 working days, whichever period is longer.

RIGHTS OF EMPLOYEES

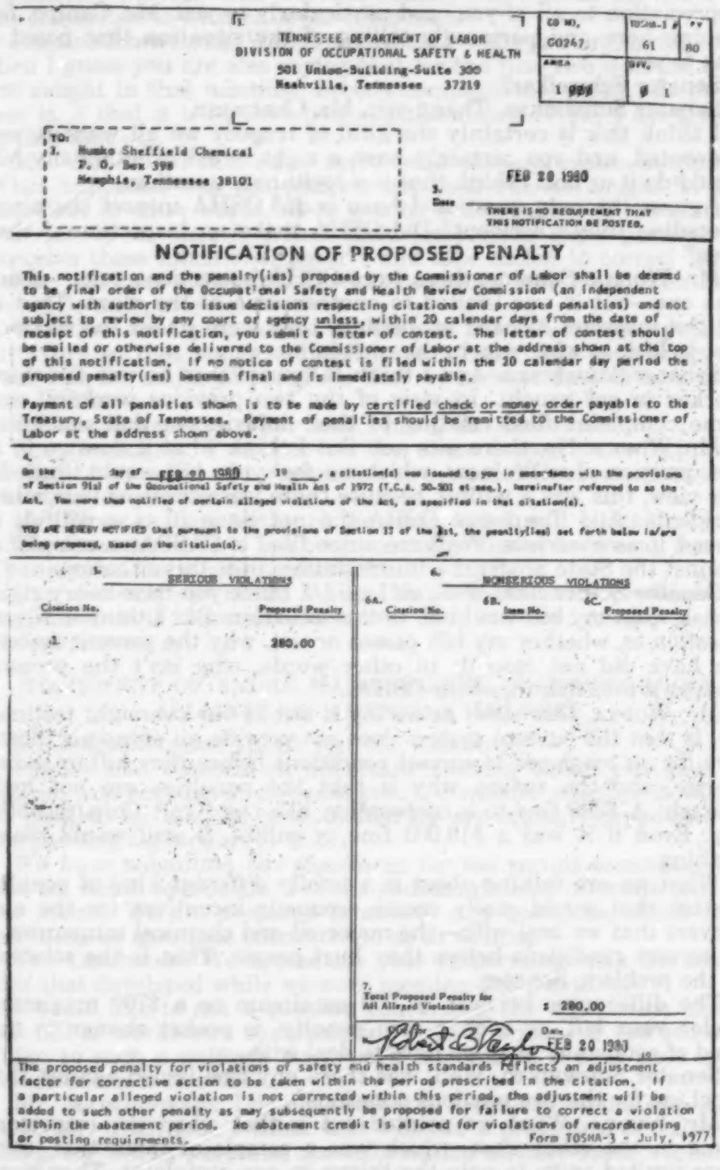
Any employee or representative of employees who believes that any terms or conditions of this citation are unreasonable, including any period of time fixed in this citation for the correction of a violation, has the right to contest such terms or conditions for correction by filing a notice with the Commissioner of Labor within 20 calendar days of the receipt by the employer of this citation.

"No employee shall be discharged or discriminated against because such employee has filed any complaint or instituted any proceeding or inspection under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any rights afforded by this Act," Section 3(g) of the Tennessee Occupational Safety and Health Act of 1972.

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

13. Director's Signature Robert B Taylor 14. Issuance Date FEB 20 1980 19

Form 10584-7



CO NO. G0247	TOSHA-1 # 61	FY 80
AREA 1 00	OFF. 0 1	

1\.
TENNESSEE DEPARTMENT OF LABOR
DIVISION OF OCCUPATIONAL SAFETY & HEALTH
501 Union-Building-Suite 300
Nashville, Tennessee 37219

TO:
2. Humko Sheffield Chemical
P. O. Box 398
Memphis, Tennessee 38101

3. Date FEB 20 1980

THERE IS NO REQUIREMENT THAT THIS NOTIFICATION BE POSTED.

NOTIFICATION OF PROPOSED PENALTY

This notification and the penalty(ies) proposed by the Commissioner of Labor shall be deemed to be final order of the Occupational Safety and Health Review Commission (an independent agency with authority to issue decisions respecting citations and proposed penalties) and not subject to review by any court or agency unless, within 20 calendar days from the date of receipt of this notification, you submit a letter of contest. The letter of contest should be mailed or otherwise delivered to the Commissioner of Labor at the address shown at the top of this notification. If no notice of contest is filed within the 20 calendar day period the proposed penalty(ies) becomes final and is immediately payable.

Payment of all penalties shown is to be made by certified check or money order payable to the Treasury, State of Tennessee. Payment of penalties should be remitted to the Commissioner of Labor at the address shown above.

4\.
On the ____ day of FEB 20 1980, 19___, a citation(s) was issued to you in accordance with the provisions of Section 9(a) of the Occupational Safety and Health Act of 1972 (T.C.A. 50-501 et seq.), hereinafter referred to as the Act. You were thus notified of certain alleged violations of the Act, as specified in that citation(s).

YOU ARE HEREBY NOTIFIED that pursuant to the provisions of Section 17 of the Act, the penalty(ies) set forth below is/are being proposed, based on the citation(s).

5. SERIOUS VIOLATIONS		6. NONSERIOUS VIOLATIONS		
Citation No.	Proposed Penalty	6A. Citation No.	6B. Item No.	6C. Proposed Penalty
1	280.00			

7. Total Proposed Penalty for All Alleged Violations $ 280.00

Robert B Taylor
Date FEB 20 1980

The proposed penalty for violations of safety and health standards reflects an adjustment factor for corrective action to be taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, the adjustment will be added to such other penalty as may subsequently be proposed for failure to correct a violation within the abatement period. No abatement credit is allowed for violations of recordkeeping or posting requirements.

Form TOSHA-3 - July, 1977

The **Chairman**. I have nothing further, except to express our appreciation to all of you, and particularly to you, Mr. Canipe, for coming here and personally telling of the situation that posed a risk to you.

Senator Schweiker?

Senator **Schweiker**. Thank you, Mr. Chairman.

I think this is certainly the kind of tragedy we all want to see prevented, and you certainly have a right to ask whether my bill would do it or not. I think that is a legitimate question.

I guess the only question I have is did OSHA inspect the place preceding Billy's accident? Did OSHA make an inspection of that area?

Mr. **Wodka**. Senator, there were OSHA inspections prior—there was one—but it was limited to another area of the plant. That is all the inspectors looked at, because they were under instructions just to look at what was in the complaint.

Senator **Schweiker**. And I think Billy said that he was the third worker to get caught. In view of the two previous workers, was some complaint filed relating to their injuries on that machine?

Mr. **Wodka**. No, there was not. But I think what it does go to is the question of willfulness, which we feel your bill would limit. In our view, this was a willful, because there were three or four other incidents. And Tennessee OSHA did not issue it as a willful; it issued it as a serious. We have since filed a CASPA, a complaint against the State program administration, over this situation.

Senator **Schweiker**. Well, as I said, I think you have every right to ask what my bill would do to this situation. But I think a bigger question is, whether my bill passes or not, why the present system we have did not stop it; in other words, why isn't the present system preventing this with OSHA.

Mr. **Wodka**. Our view, as we lay it out in our oversight testimony, is that the current system does not provide an economic incentive for an employer to correct conditions before they kill or maim people, and the reason why is that the penalties are not high enough. A $280 fine to a corporation like the Kraft Corp. is nothing. Even if it was a $10,000 fine, a willful, it still would mean nothing.

What we are talking about is a totally different kind of penalty system that would really create economic incentives for the employers that we deal with—the major oil and chemical companies—to correct conditions before they hurt people. That is the solution to the problem, Senator.

The differences between $1,000 maximum or a $700 maximum under your bill, or even a zero penalty, is pocket change to the kind of companies that we have to deal with.

Senator **Schweiker**. Well, was there any fine issued against this machine for the two previous occasions?

Mr. **Wodka**. What we pointed out is that when the inspectors came in the other time, which was a complaint inspection, they were limited to go to only the things in our complaint. They were not allowed to make a general, comprehensive inspection of that facility. That is our point.

One of the problems you have to understand is that the *Barlow* decision has really hurt the effectiveness of OSHA. An employer demands a warrant. The warrant usually will restrict the scope of the inspection to what is in the complaint.

Senator SCHWEIKER. Well, I understand what you are saying, but then I guess you are also saying that for the first two workers who got caught in that machine, nobody complained. I mean, the problem is, if that is true, then how can the system work? I am trying to find that out.

Mr. WODKA. In this case—there were three previous incidents. What happened was the workers got their sleeves caught in the machine; in other words, there was no bodily injury. If the system was set up so that it would make employers more prudent to perceive these kinds of situations and take action to correct them before you have a disaster, as what happened with Billy, then that would be an appropriate system.

What we are trying to say is that you have to create a penalty structure so that employers will have to take that extra step. In your bill, for major corporations that we have to deal with, it does not do that.

Senator SCHWEIKER. That is all I have, Mr. Chairman.

The CHAIRMAN. I wonder on the other inspection, which was limited to the area of complaint, was a warrant necessary in that situation, do you know?

Mr. WODKA. I am not sure, Senator, but I will check for you.

The CHAIRMAN. This has been most significant testimony for us. Thank you. I have nothing further.

Our next witness is Mr. Andre Maisonpierre, vice president of the Alliance of American Insurers. We welcome you back, Mr. Maisonpierre.

STATEMENT OF ANDRE MAISONPIERRE, VICE PRESIDENT, ALLIANCE OF AMERICAN INSURERS

Mr. MAISONPIERRE. Thank you, Mr. Chairman.

I sense that there is an important meeting which you have to attend, and because of the emergency, I wonder whether it would be possible for me just to state that we are strongly supportive of the pending legislation, S. 2153.

We have submitted our statement for the record sometime ago and we would appreciate it if our statement could be made part of the record. We are prepared to answer any questions, either oral questions or questions submitted to us in writing.

The CHAIRMAN. We appreciate your cooperation with the situation that developed while we were meeting this morning.

I would like to ask a question concerning the application under the bill of workmen's compensation data. I wonder if you see any value to such a uniform workmen's compensation data base as is structured into this bill?

Mr. MAISONPIERRE. I do not think it is necessarily a uniform data base, Mr. Chairman. I think that I do see a great deal of value in using, for OSHA purposes, the information already made available to State workmen's compensation agencies or additional information which could be developed by State workmen's compensation agencies.

I look upon this as constructive federalism. There is no reason why duplicate records or duplicate reportings need to be provided for. The business community has complained extensively about the extensive paperwork it is being required to provide. To the extent that material provided to one government agency, be it State or Federal, can be used by another agency, so much the better.

It has also been stated in the course of hearings that the use of State workmen's compensation agency data by OSHA may be looked upon as the "camel's nose under the tent" with respect to Federal workers' compensation.

I believe, Mr. Chairman, you are well aware of the Alliance's position with respect to Federal workers' compensation. have opposed it for these many years. I can assure you that we do not see in any way whatsoever this legislation as being either an interference, an intervention, or a prelude of Federal workers' compensation legislation, and we are supporting the bill fully.

The **CHAIRMAN**. You see no camel here?

Mr. **MAISONPIERRE**. Absolutely not, and we are often accused of seeing it.

The **CHAIRMAN**. You suggested that workers' compensation assigned risk pools be used as a means of targeting OSHA enforcement activities. I have some concern about that. Let me say first, I understand that sometimes, insurers will decline to enter an entire market. For example, in some States, insurers are very reluctant to write coverage for employers subject to the Longshoremen and Harbor Workers' Compensation Act.

Earlier in these hearings, we heard from a witness who told us the insurance carriers refused to write compensation coverage for an entire industry in a State. These are business judgments which are made by the carriers, but where they make these judgments, how is OSHA to target its enforcement activities on workers' compensation assigned risk pools, when the workers' compensation insurers are not involved in the market at all?

Mr. **MAISONPIERRE**. We are not suggesting, Mr. Chairman, that the assigned risk population in and of itself can or should be used as the targeted population.

We are suggesting that OSHA could look, and should look, at the assigned risk population as well as many other data available through the National Council on Compensation Insurance or other rating bureaus, and through the analysis of this data, develop formulas or approaches, using information developed from these data.

I might say, Mr. Chairman, that this is not an idea which is new. A number of years ago, we suggested to Secretary Corn that a better way of targeting OSHA inspections would be to look at specific industries and look at those plant locations or those manufacturers within the specific industries which had a worse than average record per industry. We offered the use of insurance data through the National Council and other rating bureaus and suggested that perhaps OSHA might want to examine the opportunity as well as how such data could be structured for its own use.

Secretary Corn ultimately did request an outside contractor to look into the matter. However, this was a few weeks prior to his resignation, and we have not been able to pursue this with the present administration, even though we have requested a number of meetings with the present administration, both on an association base, as well as a meeting with a number of our company vice president of engineering. Unfortunately, our requests for such meetings have been ignored. We have not received any acknowledgement to our letters. So the matter has been dropped by OSHA, obviously.

The CHAIRMAN. We will just pause a moment. Senator Schweiker will be back in a moment, and I know he has a question or two. We will have an informal recess for a moment.

[Brief pause.]

[Whereupon, Senator Schweiker assumed the Chair.]

Senator SCHWEIKER. The Senate Labor and Human Resources Committee will reconvene. We appreciate the witness' patience in view of the Iranian developments, of waiting for a few minutes, and we apologize for the delay.

I would like to ask just a few questions. In table 1 of your statement, you say there were about 245,000 workplaces which received safety visits by your member companies. Could you estimate the total number of workplaces visited by all insurance companies?

Mr. MAISONPIERRE. To the extent that our member companies provide about 30 percent of the private insurance premium countrywide, I believe that if you were to multiply this by 3, you would have a conservative figure as to the total number of visits performed by insurance carriers.

Senator SCHWEIKER. On page 10, you recommend that we spell out in the bill other criteria for competency of consultants, rather than leave this to OSHA to do in regulations. Why do you feel we should spell it out, and what would be the basis of some specific requirements along this line?

Mr. MAISONPIERRE. Senator Schweiker, the reason why we believe it should be spelled out, rather than left to the discretion of the Secretary through regulation is that in view of the attitude of the present, and some of the past, OSHA administrations, with respect to cooperation with the engineering services provided by insurance carriers, we feel that this broad grant of power to the Secretary could well be used to frustrate the intent of the legislation.

For instance, if the Assistant Secretary were, by regulation, to limit insurance companies' personnel to those who have been certified, there just would not be anywhere near the number of people available to do the job. What we would suggest is that a qualified person be, in addition to the specific number of years on-the-job experience that we have cited, a person who has a B.S. degree in engineering or in one of the physical sciences from an accredited university.

Senator SCHWEIKER. You recommend the use of insurance data to target OSHA inspections. Could you elaborate on the injury data which are available in the insurance industry in the kind of thing that you suggest?

Mr. MAISONPIERRE. In every State, Senator Schweiker, the insurance industry or the States—in the majority of the States, it is the insurance industry, in some States, it is the States—operate what is called a statistical rating bureau. Every single insurance company that provides workers' compensation insurance must be a member or a subscriber to that bureau. Every single company must report to that bureau extensive accident and loss data by plant location; data as to the frequency of accidents per policyholder, and severity of accident per policyholder. The data is reported to the rating bureau. The rating bureau will then computerize this data on the basis of job classifications. And the rating bureau will also have reported to it by the insurance company the amount of hours worked in the plant.

So that the rating bureau will have, No. 1, the experience of every single employer in the State. This will be tabulated by the nature of the employment in the State—electrical assembly, roofing, general contractor, et cetera. It will also have the severity, frequency of accidents per employer, per classification, in the State, as well as the amount of man-hours worked or produced by that employer in the State.

So this is the raw data used by the rating bureau to develop a workers' compensation rate. The rate developed by the bureau becomes what is known as a manual rate, average rate, applicable for that classification.

The rating bureau will, in addition, based on actuarial formulas which have been filed and approved by insurance commissioners, develop some deviation from that manual rate for each employer, so that if an employer has a bad experience, and if the frequency has been higher than average, that employer will pay a higher than average rate—higher than the manual rate. If he has had a better than average experience, that employer's rate for workers' compensation will be lower than the average.

We think that this information could be very useful to the Secretary of OSHA in targeting by industries which specific plant location has a better than average record or a worse than average record, and we would hope that this information could be used, as we have attempted in the past to get OSHA to use this information, as I had explained to Senator Williams when you were out, for targeting purposes.

Senator **Schweiker**. Are these data computerized, and can they be retrieved on an employer-by-employer basis?

Mr. **Maisonpierre**. I believe that they are retrievable by employer. What we had suggested to Secretary Corn when we presented the idea in the course of several meetings, was that either OSHA itself or a contractor be assigned to look at the data and to look at the extent to which the data itself would need to be manipulated or restructured for OSHA purposes.

Secretary Corn did assign an outside contractor to do this very job. Unfortunately, this was just a couple weeks before he submitted his resignation. When the present Secretary took office, we submitted several requests to her for reinstatement of the discussion, and we have never received an answer to our letters; they have been totally ignored.

[The prepared statement of Mr. Maisonpierre follows:]

STATEMENT OF THE

ALLIANCE OF AMERICAN INSURERS

BEFORE THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

ON THE

OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS
ACT OF 1980 - (S.2153)

APRIL 16, 1980

HIGHLIGHTS OF ALLIANCE STATEMENT

1. The Alliance supports the Occupational Safety and Health Improvements Act of 1980 (S. 2153) because it provides incentive for businesses to conduct sophisticated health and safety programs and directs OSHA to focus its resources on problem areas. It also de-emphasizes the use of penalties as an enforcement mechanism and attempts to coordinate insurer-provided safety consultation services with public health and safety programs. (page 1)

2. The legislation would replace the present emphasis on threat of inspection, and rigid adherence to detailed regulations with a system based on incentives and inducements, the tools which insurers have found to be the most effective in selling business on safety management. (page 2, 3)

3. Orienting OSHA to the incentive approach requires legislation because the enforcement concept has become ingrained throughout the agency. (page 3)

4. Exempting work locations with good safety performance from routine inspection would free OSHA to concentrate on the most serious problems first, thus achieving maximum results for time and money spent. (page 3,4)

5. The Alliance urges immediate enactment of S. 2153, noting that further study and refinement are necessary to provide for safety rating criteria corresponding to the specific hazards which different industries present. (page 5)

6. As a means of identifying locations in need of OSHA attention, the Alliance recommends the use of insurance data. A study of those businesses whose safety performance has put them in the assigned risk category for purchase of workers' compensation insurance could provide such identification. (page 5-7)

7. The insurance industry's several thousand full time field technicians who advise policyholders on loss control efforts could be further utilized by the business community in achieving required safety performance. Alliance members would welcome the challenge of this increased consultation work. (page 7, 8)

8. While the Alliance fully supports OSHA's purpose and authority, achieving a high level of workplace safety requires both private and public initiatives. (page 9)

9. Penalties -- many of them levied for relatively minor infractions -- are largely responsible for business antagonism toward OSHA today. (page 10, 11)

10. S. 2153 is a major reform proposal which will encourage the coordination of public and private resources which is necessary to move the nation forward in providing employees with a healthful and safe working environment. (page 11)

My name is Andre Maisonpierre. I am a vice president of the Alliance of American Insurers. The Alliance is a major national association of property and casualty insurance companies. Its membership writes about 30 percent of the workers' compensation business placed with insurance in this country.

Mr. Chairman, we appreciate the opportunity to appear before the Committee in support of the Occupational Safety and Health Improvements Act of 1980, S.2153. Although we have historically been strong and active supporters of OSHA, we have been disappointed and frustrated with the philosophy underlying the administration of the Act and with the administration per se. S.2153 would require a major re-orientation of OSHA's management priority very much along the lines which we have been urging upon OSHA for the past several years.

Mr. Chairman, we support S.2153 because:

- It provides incentive for individual businesses to adopt and maintain sophisticated health and safety practices.
- It would require OSHA to focus its resources on problem areas.
- It recognizes the valuable services which insurers are providing to the business community in the management of safety and health problems and it attempts to coordinate these extensive services with public health and safety programs.
- It de-emphasizes the use of penalties as an enforcement mechanism.

I. S.2153 Provides Incentive for a Business Community to Adopt Sophisticated Health and Safety Management Programs

Historically, the insurance industry has found that incentives and inducements are the most successful tools to sell the business community on safety management programs. In fact, many Alliance member companies were initially created to provide, through loss control eudcational efforts, lower workers' compensation insurance costs for policyholders. It did not take very long for management to appreciate that workers' compensation insurance expenses could be substantially reduced through a relatively small investment in safety. Furthermore, management was also prompt to understand and appreciate that workers' compensation insurance cost savings were but a fraction of the total savings accruing to an employer implementing a safety program.

The motto "safety pays" itself denotes a financial motivation which coincides with humanitarian concepts and which has served our industrial society well over the years.

The problem with OSHA, from the very beginning, was that it adopted an antagnostic attitude toward the business community, expecting that safety could be "enforced" by law and regulation rather than "sold" by education and cooperation.

The threat of an OSHA inspection, with all of the disruptive aspects accompanying such an inspection,has created an uneasiness prevading the business community. OSHA has been viewed as a police force, aimed at disrupting plant activities, trying to bring about a safe working environment through conformity rather than ingenuity. The business community has contended that it has been smothered by over-regulation -- victimized by ill-informed and even capricious enforcement activities of inspectors who too often combine a surfeit of zeal with a lack of training and knowledge.

OSHA's requirement of rigid adherence to detailed regulatory standards, rather than reliance on objective performance standards, has created serious and unattainable situations for a broad spectrum of the business community.

Mr. Chairman, we believe that the major improvement contemplated through this legislation is an attitudinal change toward occupational health and safety. S.2153 does provide incentives for improved safety management in individual workplaces. It eliminates the threat of disrupting OSHA inspections and de-emphasizes the use of penalties at those locations which have sustained a better-than-average health and safety record and have established ongoing sophisticated health and safety programs.

It may be said that orienting OSHA to the incentive approach should not necessitate legislation. Mr. Chairman, we believe that the enforcement concept is so ingrained throughout the OSHA bureaucracy that only through legislation canone hope for a change in management philosophy.

II. S.2153 Focuses on the More Serious Problem Areas

The present practice of selecting workplaces to be visited on the basis of employee complaints or on the inclination of the OSHA inspector does little to assure that the really unsafe workplace will receive adequate and timely attention. In the absence of realistic and workable priorities, there is no way that OSHA can concentrate on the problem areas first, thus achieving the most for the time and money expended.

This was recognized by OSHA's management some years ago when the National Emphasis Program came into being. Under the program, a number of "target industries" were selected to receive special attention.

Foundries,generally agreed upon to be one of the most hazardous workplace situations, were the first industry so designated.

The approach under the National Emphasis Program was a major departure from the usual rigid compliance activity which had, heretofore, been the OSHA's inspector role. Personnel calling on foundries were to have been specially trained and directed to evaluate the entire workplace situation, rather than merely authorized to decide whether there was technical compliance with OSHA regulations.

Although we viewed the National Emphasis Program as a more rational approach to occupational and health management, the program failed to make a distinction between the best and the worst foundries. Thus, insofar as that industry was concerned, there was no incentive for improved safety management in order to escape an OSHA inspection. In fact, the National Emphasis Program almost guaranteed an OSHA inspection for those work locations falling within the targeted industries.

S.2153 does attempt to overcome this problem. A better than average safety record would automatically exempt a work location from routine inspection. We believe that this is a major step in the right direction. It should not, however, be considered a final approach.

A serious weakness with the specific priority established in S.2153 is that it rates all work locations alike, except in regard to number of employees. The bill fails to recognize that some industries are inherently more hazardous than others and are likely to generate more accidents than others.

S.2153 is likely to exempt a large number of workplaces which may very well have a worse-than-average accident frequency as compared to similar type work locations. One would expect that most retail and clerical type operations will easily qualify for the exemptions but that more hazardous locations such as foundries, construction sites, etc. will not.

We would suggest that Congress should enact S.2153 now, with the recognition that the specific exemptions from inspection provided in the legislation are not "the final word" and that further study be undertaken to refine the concept.

Specifically, we urge that an attempt be made to find ways to measure a workplace against others in the same industry and to establish different criteria by industries, based on the hazards which they present.

Some years ago, under a prior OSHA administration, the Alliance suggested such a "worst-first" approach, which embodied the reorientation of OSHA's resources toward those plant locations having a worse accident record than others in similar industries. At the time, we suggested that insurance records might be of use in identifying specific plant locations in need of OSHA attention. Specifically, we suggested that a study be made of the workers' compensation assigned risk populations for such identification.

We believe that the matter was considered by OSHA and that one of OSHA's many independent contractors was asked to look into the feasibility of such an approach. The matter was dropped, however, when the present administration took over. We made several attempts to meet with the present administration to suggest a continuation of the efforts that had been undertaken previously to try to implement a "worst-first priority program." We have not been successful.

We fully recognize the difficulties in attempting to compare the safety records among plants within similar industries. No two are alike. The Inter-Agency Task Force on Workplace Safety and Health suggested using the workers' compensation insurance experience modification factor as a fair gauge of plant safety records within similar industries. We disagree -- it would not be a proper gauge.

Workers' compensation insurance rates are developed for hundreds of job classifications. The rates vary depending on the experience of each classification. The premium is then determined for the classification by multiplying the rate, which is a function of payroll by the total payroll for the classification. A manufacturing employer may very well have a number of classifications applying to its specific operation but the classification which will be applied to that employers' total manufacturing operation will generally be that classification which is most prevalent in that employers' shop Hence, one could readily have a television manufacturing having lathe operators, electricians, and electrical assembly personnel all grouped under the single classification of "electrical assembly" even though each of these operations may be individually identifiable in the rate manufal. Assuming that "electrical assembly" is the most prevalent operation of that television manufacturer, all of his manufacturing employees would fall under that particular classification.

Thus, the mix of employment among relatively homogenous manufacturers may create substantial variance in the premiums among those manufacturers -- even though the classification applicable to this homogenous group may be identical. Let us take a televisions manufacturer which decides to manufacture its own television cabinet as against another one that opts to contract out the manufacturer of cabinets. The first one will have on its payroll a number of woodworkers -- an occupation which is inherently more dangerous than that of electrical assembly. One should expect that manufacturer to have higher insurance costs -- as a result of more accidents -- than the manufacturer which subcontracts its cabinet work. Yet, the prevailing classification for both manufacturers would be the same -- electrical assembly. The first manufacturer will have a worse modification factor with respect to workers' compensation insurance. However, that factor would not necessarily be indicative of a more relaxed safety environment at the workplace.

Again, Mr. Chairman, we want to stress our belief that the priorities set forth in S.2153 are an excellent starting point which should be implemented without delay. We would hope that further study could refine this priority in the years ahead.

III. S.2153 Recognizes the Need for Coordination Between Government and Private Safety Efforts

Workers' compensation insurers have no formal relationship with OSHA or with any of its affiliated programs. However, insurers do play an essential role in the field of occupational safety and health.

With several thousand full time technical personnel in the field (compared to OSHA's 1,000 inspectors) the insurance industry represents a large percentage of the nation's safety and health professionals.

There are two basic functions which insurer safety services include: the survey and evaluation of risks for underwriting purposes, and provision of overall loss control consultation services to policyholders. Insurance people provide these services on their own initiative.

Tracking closely with the safety and health effort of the workers' compensation insurer are the related safety services provided policyholders under fire, general liability and product liability policies. All of these contribute to job safety and health goals.

From the standpoint of overall safety and health, the extensive structure of the insurance industry already in place, and financed by employer-insureds, has many advantages over a government-sponsored program. The entire private workers' compensation mechanism operates on a financial incentive system in which costs are related to the degree of safety and health achieved. No taxpayer dollars are needed to support the system. Because of the diverse nature of the coverages provided, insurers are equipped to consider each overall safety and health situation, using professional judgement where indicated, and are not limited to consideration based on rigid technical standards.

Because of its vast loss control system -- extending throughout the 50 states -- the insurance industry is able to make hundreds of thousands of consultation service calls each year. Table I provides a breakdown of Alliance member company 1979 safety and health activities.

There is, however, a limit to what private industry can do in promoting workplace safety and health. Insurers can only recommend to the employer. While much can be accomplished through motivation and the financial incentives inherent in the insurance system, the fact remains that the insurers, unlike government, cannot enforce their recommendations other than by withholding coverage. In such cases, businesses can still obtain coverage in the residual market.

Given this option, an employer remains free to disregard professional safety advice until such time as that advice is backed by an OSHA citation.

It is because of this limitation on private initiatives and activities that we supported OSHA from the very beginning. We believe that there is a need for both private and government initiatives. However, they should be coordinated. Frankly, we have found it difficult over the years to establish such a coordinated, cooperative effort with OSHA. Cooperative efforts have been perfunctory. Even this low level of cooperative activity has almost ceased under the present OSHA administration.

S.2153 recognizes the role which private industry should fulfill in providing consultation services to the business community. We welcome the challenge.

We would urge, however, an important amendment to Section 4A(g)(1)(C). This section would require that private consultation programs which qualify an employer for the penalty limitations would have to be carried on by individuals "certified as safety professionals by the Board of Certified Safety Professionals, or licensed as professional engineers with a safety specialty by any State, or, with respect to health matters, certified as industrial hygienists by the American Board of Industrial Hygiene." We believe, Mr. Chairman, that this requirement as it pertains to certification is too rigorous. There just are not enough certified safety professionals available today to perform the tasks contemplated under the legislation. Furthermore, we do not believe that all safety consultation services require the expertise and sophistication of certified safety professionals. Accordingly, we would urge that that part of Section 4A(g)(1)(C) cited above be replaced by the following phrase:

> "qualified as safety personnel. Under the terms of this act, a qualified person shall mean any person with an accredited degree and having a minimum of three years of full time experience in occupational safety or health consultation and working in the field on the effective date of this act or working under the direct supervision of a person so qualified."

We believe that it is incumbent on insurance carriers to provide safety consultation services to policyholders in the most efficient way possible. Proper supervision of safety personnel by qualified individuals is the best way to allocate available resources.

Table II provides a breakdown of the number and qualification of safety and health personnel employed by Alliance member companies in 1979.

IV. S.2153 De-emphasizes Penalties

Generally speaking, the penalties imposed by OSHA on the business community have had greater psychological than financial impact. The fines have in most cases been relatively small -- usually less than $1,000 and often only $30 or $50.00. However, many of the fines have been levied for relatively minor infractions. These penalties have played an important role in the development of the antagonistic attitude which the business community today has toward OSHA.

We do not believe that penalties generally have a significant effect on the safety and health environment in the workplace. To the extent that the role of penalties is de-emphasized by OSHA, this will lead to a better attitude on the part of the business community toward OSHA and hence toward health and safety generally.

V. Conclusion

In conclusion, Mr. Chairman, we view S.2153 as a major reform proposal. We expect that it will have salutory effects on improving the workplace environment and on breaking down the distrust which has developed over the years within the business community toward OSHA. It is essential that this distrust be eliminated if we are going to move forward in providing our nation's employees with healthful and safe workplaces.

TABLE I

Category	1979 Calendar Year Activities	Comments
1. Number of workers' compensation	policyholder visits (approximate)....306,000	None
2. " " " "	workplace locations visited " 245,000	None
3. " " " "	Industrial Hygiene Surveys " 4,757	None
4. " " " "	Health and Hygiene samples analyzed 31,301	None
5. " " " "	Published articles requiring research 112	None
6. " " " "	Formal training programs presented .. 2,305	Over 4 hours duration each
7. " " " "	Policyholder representatives attending training programs ... 37,586	None
8. Number of workers' compensation	Loss Control employees completing internal basic safety and health training...................... 450	Primarily new employees
9. " " "	pieces of safety and health literature printed or purchased for policyholder distribution and use 4,909,000	Includes handouts, posters leaflets, brochures, etc.

TABLE II

WORKERS' COMPENSATION INSURERS SAFETY AND HEALTH SERVICES QUESTIONNAIRE

	Category	Alliance Members	% of Total	Comments
1.	Number of full time Loss Control Representatives..	1,716	-	Technical personnel only
2.	" " " Industrial Hygienists.........	71	4.1	Includes certified and non-certified
3.	" " " Occupational Health Nurses....	52	3.0	Includes two physicians
4A.	" " " Certified Safety Professionals	428	24.8	Includes managers and supervisors
4B.	" " " Registered Profesional Engineers	171	9.8	Includes line and staff personnel
4C.	" " " Certified Industrial Hygienists	36	2.1	51.4% of the Industrial Hygienists
4D.	" " " Certified Occupational Health Nurses.....................	24	1.4	46.1% of the O.H. Nurses

Senator **Schweiker**. Well, I thank you very much for your patience concerning the interruptions, as well.

This concludes the hearings of the Labor and Human Resources Committee on OSHA legislation.

The committee stands adjourned until further notice of the chairman.

Thank you very much.

[Whereupon, at 12:37 p.m., the committee was adjourned.]

APPENDIX

STATEMENT OF

ROBERT F. HARBRANT, PRESIDENT

FOOD AND BEVERAGE TRADES DEPARTMENT, AFL-CIO

S. 2153

THE OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980

April 25, 1980

My name is Robert Harbrant and I'm the President of the Food and Beverage Trades Department, AFL-CIO. I am submitting testimony on S. 2153, the OSHA Improvements Act of 1980, on behalf of the 14 international unions (2.7 million workers) represented by this department. Our members are employed in thousands of different workplaces ranging from retail food stores to bottling plants, and from poultry processing houses to institutional kitchens. The Food and Beverage Trades Department (FBTD) oppose S. 2153 because it violates both organized and unorganized service workers' interests. Our position results from analyzing service workers' unique health and safety problems. Although S. 2153's stated intent is to improve OSHA by focusing resources on hazardous industries, the bill's actual impact would spell disaster for working men and women.

Labor's commitment to the OSHAct, a landmark in human rights legislation, has remained steadfast throughout the past decade. Although often critical of the agency, our critiques are made in the context of strengthening workers' rights and protection under the law. Our tenacity is easy to understand - our members' lives depend on it!

In our recent testimony to the Committee, workers from the grain, meat, retail, hospital, building services, bakery, and glass industries all repeated the same message: in order to improve the health and safety of workers, OSHA must be strengthened! We need more inspectors with better training who will spend the bulk of their time in the field. Instead we face legislation which will waste OSHA staff hours processing employer affidavits and assurances of hazard abatement; tasks we believe will contribute little or nothing to protecting workers.

Why do we regard this bill as a deterrent to improving health and safety conditions in our industries? The bill is based on the following assumptions: 1) OSHA's current targeting system needs substantial modification; 2) There are methods available to determine a safe workplace; 3) A system of employer assurances in response to workers' complaints about safety problems would be effective; and 4) An advisory health and safety committee and consultation program would so greatly improve conditions that penalties for certain safety violations would become unnecessary in "safe" workplaces and could be reduced in "unsafe" workplaces. Quite frankly, the experience of our membership disproves each of these assumptions!

ASSUMPTION 1: OSHA'S CURRENT TRAGETING SYSTEM NEEDS SUBSTANTIAL MODIFICATION

S. 2153 prescribes a major overhaul for OSHA's "severely flawed" targeting system. However, this indictment of current policies does not stand up under close scrutiny.

OSHA's critics claim the agency is making unnecessary visits to safe workplaces. But this just is not true! OSHA's target system already directs the bulk of inspections to workplaces in the most hazardous industries. Moreover, the few inspections in workplaces deemed safe, by S. 2153's criteria, serve an important function.

Take an example from the retail sector. Although food store workers experience higher than average injury/illness rates, many food stores would qualify for exemptions, were S. 2153 in effect. Yet, in 1978 under OSHA's current system,there were routine inspections in only 13 grocery stores from a pool of approximately 50,000 establishments. This hardly represents an excessive inspection record. Furthermore, the United Food and Commercial Workers (UFCW) claim the presence of OSHA, established by these few routine inspections combined with complaint-initiated inspections, enhances resolution of other hazards without OSHA's direct assistance. A targeting system based on exemptions would eliminate this indirect benefit.

Business representatives cry for relief from OSHA. But, we must ask, is this requested relief necessary? For example, should OSHA's resources be redirected to avoid 13 inspections in the so-called "safe" retail sector. We answer a resounding "no"! The staff time demanded by the affidavit system and employer assurance process will inundate OSHA's small workforce with paperwork. We need these people out in the workplace making inspections.

The Government Accounting Office's report, "How Effective Are OSHA's Complaint Procedures?" indicated only about 20 percent of complaint-initiated inspections uncovered serious violations. We disagree with the report's conclusion that the remaining 80 percent of inspections represent wasted resources.

A careful examination of OSHA's criteria for citing a "serious violation" indicates several factors are considered. The seriousness of existing hazards, the company's health and safety record, and past good faith efforts to provide a safe workplace are all weighed by OSHA in determining violations and assessing penalties.

We raise no objections to this policy. However, given this system, the "violation cited" is a poor indicator of the seriousness of workplace hazards. OSHA's record of serious violations cited in complaint-initiated inspections is not useful in evaluating the agency's inspection system. Yet, based on such misleading reports, S. 2153's sponsors plan to replace OSHA's current targeting system and complaint procedure with an exemption system.

Totally absent from the public record is any evidence indicating an employer exempted under S. 2153 would maintain a safe workplace. The proposed system of exemptions, affidavits, and a modified complaint process can be rationalized only by blind faith that employers will take measures to protect their employees. Recalling the status of worker safety prior to OSHA, we see no justification for this extraordinary trust.

Under OSHA's current targeting system the overwhelming majority of employers already know they will not receive routine inspections. We contend that S. 2153 does not offer employers enough additional "incentive" to improve current health and safety practices which often fall short of ensuring worker safety. It is clear that without a strong agency establishing and enforcing protective standards, health and safety conditions will only worsen.

At the heart of the criticism launched against OSHA's targeting system is the myth of the hazard-free workplace. The belief that work in the service industries is safe, healthy and pristine is particularly widespread. However, the following situations reveal this stereotype does not hold true.

Take the example of a kitchen worker faced with slippery floors - not a serious hazard according to the OSHA classification system. Nonetheless, this is a very serious hazard to the worker who slips, breaks her hip, and is out of work for six months.

Look critically at a poultry house accident where a woman was struck by a forklift. An investigation revealed the forklift operator never received training on safe forklift operating procedures. Far from an isolated incident, lack of training is a common workplace problem. A research team, from University of Wisconsin, determined 45 percent of all industrial accidents are caused by a lack of proper training. Clearly, improper training should be considered a serious hazard.

Commonly used machinery causes countless accidents in our workplaces. For example, the "super-wrapper" used to affix labels to meat products appears to be a harmless hand-held tool. However, when this tool is poorly maintained and placed in the hands of an untrained worker disaster often results. A young D.C. clerk recently lost a finger to the "super-wrapper" while employed in a so-called "safe" food store.

Today's retail industry includes establishments that sell combustible materials. No matter how carefully these materials are handled and stored, they present a risk of fire and explosion. If an explosion does occur, the danger is compounded by cluttered aisles and blocked fire exits. A small fire in a previously accident-free store can result in a tragic loss of lives if these "small" hazards are not discovered during routine safety inspections.

These few examples are not unique horror stories! They represent the reality of work in today's service industries.

The Schweiker Bill assumes a hazard does not become serious until someone gets hurt. Our interest in preventing accidents makes this view completely objectionable. Put into practice, this philosophy strips certain workplaces of inspections, based on previous accident history. This is contrary to every tenet of public health and safety practice.

If you survey passengers at an airline terminal I guarantee they would not want the plane they are boarding exempted from safety inspections based on a prior accident record. As a society, can we afford to be any less rigorous in safeguarding the lives of 4 million workers currently under the OSHA law's coverage?

ASSUMPTION 2: THERE ARE METHODS AVAILABLE TO DETERMINE A SAFE WORKPLACE

Unreliable data is a major barrier to identifying a "safe workplace". S. 2153 details an exemption system based on lost workday data from State Workers' Compensation Systems and employer affidavits. Flaws in workers' compensation systems have already been thoroughly discussed in AFL-CIO testimony before this committee. Our comments will highlight the problem of relying on lost workday figures to assess a workplace's safety. Companies presently manipulate these figures to avoid high workers' compensation premiums. We shudder at providing them another incentive to abuse workers' health.

The lengths to which some companies go to keep their lost workday rates down are appalling. Workers at a distribution center in Pittsburgh, represented by the UFCW, are victims of just such an effort to keep every man and woman on the job, despite serious injury. In 1978, 129 accidents resulting in lost workdays were logged while only 54 of these accidents were recorded in 1979. The Secretary of the union explained, "In 1978,

best copy available

the Safety Director mandated people hurt on-the-job must be sent home. When the rates skyrocketed the company got rid of the Safety Director and changed its policy."

The new policy didn't change unsafe conditions, rather it attacked reporting injuries and the practice of sending injured workers home. The program included a company letter to an injured worker's private physician encouraging the doctor to advise his patient to return to light duty. Injured workers, out on workers' compensation, were told to return to a light duty job or face a company challenge to their compensation benefits.

One union officer recalled two typical examples of attempts to avoid reporting lost workdays. The first case involved an older worker, employed as a sweeper, who fell at work and suffered strained cartilage. This man was not given any time off. A second worker, a tinner, broke his hand at work. For six weeks after the accident he was on the job although unable to perform work due to his injury. This accident did not result in even one reported lost workday.

This company's policy for workers injured outside of the workplace was quite different. In these cases, the individual had to be examined by the company medical department and deemed fit to perform all the duties of the job before allowed to return to work. This policy discrepancy is also cited as a common problem by the Bakery, Confectionery and Tobacco Workers International Union (BCTWIU), another FBTD affiliate.

Company practices which hide serious injuries are also cited as a problem by Glass Bottle Blowers Association (GBBA) members. Employees in a Baltimore glass bottle plant suffer severe cuts, on a daily basis, while reaching for bottles passing by at a very fast pace. Standard procedure for this problem involves a visit to the company clinic, stitches, a lecture on working safely and a return-to-work order. Workers have no protective gloves and the pace of the work, clearly a factor contributing to the accident rates, has not been reevaluated. A GBBA local union official noted workers are exposed to several chemicals which can easily infect the wounded area.

Back injuries are another common occurrence in this glass bottle plant. After hurting her back. one employee was sent to the company nurse, given aspirin, a heating pad, and returned to work. The woman worked three days in intense pain. After the third day, finding it difficult to walk, she went to the hospital. The doctor diagnosed a sprained tendon and prescribed a minimum of 5 days complete bed rest.

Bakery, Confectionery, and Tobacco Workers International Union members repeat the same story, verbatim, in their attached statement. We can only conclude these immoral practices to reduce lost workdays are widespread throughout all industries. Therefore, reliance on workers' compensation data and employer affidavits indicating lost workday rates will not unveil the true nature of safety conditions in the workplace. Furthermore, there are no existing data bases which can effectively serve this purpose.

ASSUMPTION 3: A SYSTEM OF EMPLOYER ASSURANCES IN RESPONSE TO WORKERS' SAFETY COMPLAINTS WOULD BE EFFECTIVE

We believe a system of employer assurances in response to complaints is ineffective. Rather than facilitate improved conditions the "assurance process" will place an additional layer of bureaucracy on an already overburdened system. Most importantly, another delaying tactic will be added to existing impediments (the warrant system, employer contests of citations) to timely hazard abatement.

Presently, workers wait weeks to months before their safety problems are remedied, even after an OSHA inspection. The Occupational Safety and Health Review Commission reports approximately 25 percent of all workplace citations are contested by the employer. Current procedures leave workers exposed to alleged hazards during lengthy legal proceedings. The proposed employer assurance system will only worsen this dangerous situation.

The hazards faced by FBTD members demand prompt attention. A UFCW local in Pittsburgh reported a problem of exposed electrical wiring in an area of dripping water. The problem was brought up at joint labor management health and safety committee meetings for three months, to no avail. Finally the union called OSHA and received an 8 hour inspection. The next day an electrician was there fixing the problem. If a system of assurances had been in effect, how much longer would these workers have been exposed to this hazard?

The experience of another UFCW local at a food processing plant in Chicago was similar. After months of complaining about extension cords taped to the floor in an area full of water puddles the union filed a complaint with OSHA. Only after the OSHA inspection and the issuance of citations, was the wiring system attached to the walls, away from pools of water. Again, can we afford to add more time to an already unreasonably long process of hazard abatement?

A restaurant worker's story typifies the reluctance of many small employers to respond to safety hazards in a timely fashion. In a restaurant of 30 employees, where management-staff relations are cordial, a safety flaw in the kitchen floor surface was ignored for weeks. The employer's execuse was "new floor material was on order and her friend just hadn't had time to get around to fixing it yet." The worker finally threatened to call OSHA. Miraculously, the next day there was someone in the restaurant fixing the floor.

These experiences illustrate the importance of a complete right to a prompt OSHA inspection for workers in all workplaces, large or small, so-called safe or hazardous. A system of employer assurances would only serve to postpone abatement of hazards and unduly jeopardize the health and safety of workers.

ASSUMPTION 4: THE EFFECTIVENESS OF ADVISORY HEALTH AND SAFETY COMMITTEES AND CONSULTATION PROGRAMS MERITS REDUCED AND DISMISSED OSHA PENALTIES

The final major assumption of S. 2153 is the efficacy of advisory health and safety committees and consultation programs to improve safety conditions. The question is, given the narrow powers outlined in S. 2153 will the mandated health and safety committees serve as effective tools to hazard abatement? Based on our membership's experience our response is resoundingly negative.

Even unions with strong health and safety committees have an uphill struggle in getting hazards corrected. An American Federation of Grain Millers (AFGM) local is a good case in point. Local 118 had been agitating for years about elevator hazards. Only after complaints were filed with every elevator in the Twin Ports, and multiple inspections ensued, were steps taken by the grain companies to correct the many health and safety problems facing these workers. It took 12 years of concerted effort by the local's health and safety committee before these workers saw some relief.

Senator Schweiker inadvertently highlights the inadequacy of tying health and safety committees to penalty reductions and dismissals in an interview with a representative from the National Association of Manufacturers (NAM). Schweiker assuages industry's fears about the committee/consultation program with the following statement: "The bill includes only minimal structural requirements to ensure meaningful employee involvement. Beyond that, it will be left to the people involved to make it relevant to the workplace. The committee could be of all employees or a joint employer-employee committee. The employer is simply required to consult with the committee on safety matters and respond to the committee's suggestions. Of course, the committee itself is purely advisory."

The bankruptcy of these "shadow" committees as a solution to modern occupational safety problems is readily apparent. The committees' strictly advisory nature straightjackets any potential effectiveness. Our experience leads us to the conclusion that advisory health and safety committees are little more than window dressing without the backup of a strong OSHA, a complete complaint-inspection procedure and significant penalties. Our safety representatives in the field warn that even companies with a genuine commitment to safety need outside pressure to keep on top of all safety problems. Thus, while in principle we encourage these committees, in the context of this bill, their usefulness is limited.

CONCLUSION

In conclusion, concern for the lives of our 2.7 million members, dictates that S. 2153 be rejected in its totality. Any other action mocks the purpose of the original legislation which was "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." This goal has not yet been achieved. Only by strengthening OSHA, can a safe job become a reality for working men and women.

The solution to safety problems faced by the BCTWIU's membership demands a strong OSHA. The following brief statement by President DeConcini emphasizes that S. 2153 would be detrimental to BCTWIU's 170,000 members.

STATEMENT OF
JOHN DeCONCINI, INTERNATIONAL PRESIDENT
BAKERY, CONFECTIONERY AND TOBACCO WORKERS INTERNATIONAL UNION

My name is John DeConcini. I am the International President of the Bakery, Confectionery and Tobacco Workers International Union which represents over 170,000 members throughout the United States and Canada.

We appreciate this opportunity to present our views on the Occupational Safety and Health Improvements Act of 1980 introduced by Senator Schweiker et al. The Bakery, Confectionery and Tobacco Workers International Union has gone on record many times in the past in favor of improving the Occupational Safety and Health Act of 1970. We have expressed our recommendations to Congressional appropriations committees, including a call for increased funding for the hiring of more compliance officers. We have gone on record in support of better safety and health standards and for the elimination of unnecessary ones.

In our March 21 testimony before this Committee in its OSHA oversight hearings, we documented the ways in which OSHA has made a vital difference in the working lives of our members. After carefully examining S. 2153, we can only conclude that this bill will be detrimental to the safety and health of our members.

One of the chief problems with this bill is that, under it, OSHA inspections are predicated on available statistics on lost workday injuries. In many cases, we have found that employers retain injured workers on their payroll by transferring them to lighter tasks or make-work jobs, thereby avoiding lost worktime assessments.

In a current dispute between our local union in Washington, D.C. and a bakery employer, the company, in its actions, has differentiated between two employees, one injured on the job and the other on the outside, who sustained the same level of disability. In the case of the former, the company transferred him to a light duty task. The other employee has not been allowed by the company to return to his job until fully recovered. Unfortunately, this is not unique to this particular plant. We have found instances of this management policy (of transferring injured workers) in-a tobacco plant in Louisville, Kentucky, in a bakery plant in Spokane, Washington, in another bakery facility in Columbus, Ohio, and in other plants where our members work.

We strongly urge this Committee to take into account this widespread practice by employers and to reject any over-reliance on inaccurate and misleading statistics as the basis for determining whether an employer should be subject to inspections, as S. 2153 calls for.

We are also very concerned about the provision in Seantor Schweiker's bill which woulc provide for employer notification of an impending inspection and would do away with unannounced inspections by OSHA. We contend that it has been this ability by OSHA to make on-the-spot inspections that has made possible employer-union cooperation in correcting problems without resort to OSHA. Our members are convinced that it is this "threat" of an unannounced OSHA inspection which has encouraged employers to be more conscientious in health and safety matters. This is particularly important for those workers who do not have the benefit of union representation.

The fears that we have of how things would operate under Senator Schweiker's bill are well illustrated by the following example. In a Rockville, Maryland bakery plant, the employer was given five days advance notice of an OSHA inspection. He moved to correct the situation temporarily and, as a result, no citation was given and, consequently, no abatement date was set. The temporary nature of employer remedies (since there is less incentive to correct the situation permanently with preannounced inspections) we feel will be a growing trend under S. 2153.

Another serious threat to the health and safety of our members is posed by S. 2153's limited definition of workplace. We feel the interpretations of "workplace" will be contended by employers who will argue that an OSHA inspector is limited to an area of "separate activity" and should not, automatically, have full run of the plant.

As we understand the term "workplace" as used in S. 2153, an OSHA compliance officer could not issue a citation for a serious violation on a loading dock if an employee filed a complaint about a condition on the production line in a plant.

An example in our industry involves our local union in Memphis, Tennessee which filed a complaint with OSHA on conditions in a flour storage area. The compliance officer, after a full inspection, cited the company for several additional violations involving electrical connections and machine guardings in the production part of the plant. Under S. 2153, it is unclear whether this compliance officer would have had access to the production part of the plant. Furthermore, it is doubtful that, with the other restrictions provided for by S. 2153, a site inspection would occur in the first place.

Although we agree, in principle, with S. 2153's mandating of joint safety committees, we disagree that this concept should be linked to peanlty limitations. Our experience with joint safety committees goes back many years prior to the passage of the Occupational Safety and Health Act. These committees should work to compliment the efforts of the Occupational Safety and Health Administration and promote the intent of the Act. We feel strongly that they should, in no way, be a vehicle for allowing employers to avoid penalties for violation.

We have found that most joint safety committees are only advisory and that their advice is generally ignored. We support the concept of mandating that employers respond to the recommendations of these committees and follow through on these recommendations. We endorse any steps that strengthen the powers of these joint safety committees to carry through work-site improvements, as long as this effort remains clearly separate from OSHA's activities in assessing penalties.

The Bakery, Confectionery and Tobacco Workers International Union, after reviewing the provisions of S. 2153, emphatically questions the use of the word "improvement" in the title of the Act. We contend that this Act does nothing to "improve" the Occupational Health and Safety Act, but rather, clearly compromises the intent of that important piece of legislation to provide safety and health protections for working people.

We, therefore, urge this Committee to reject S. 2153 in its totality.

STATEMENT

of

Frank E. Fitzsimmons, General President
International Brotherhood of Teamsters, Chauffeurs,
Warehousemen & Helpers of America

Regarding S. 2153, OSHA Improvements

Before the

Committee on Labor and Human Resources

Dirksen Senate Office Building
United States Senate
Washington, D.C.

May 2, 1980

The International Brotherhood of Teamsters represents over two million working men and women. A large number of our members are employed in the trucking, airline, and other industries outside the general scope of OSHA authority, but the overwhelming majority - something on the order of 1.6 million workers - are employed in industries within the legal jurisdiction of the Occupational Safety and Health Administration. Therefore, any legislation affecting the rights and protections of these employees under the OSHAct is of the highest priority to this organization.

In addition to expressing the concerns of our membership, we feel it necessary to speak for the millions of unorganized workers in America. If legislation limiting OSHA's authority is made law, our members and the rest of the organized labor force will still be able to look to their unions for safety and health protections obtained through collective bargaining. But three-quarters of the workforce don't enjoy the benefits of union membership. If OSHA's enforcement effectiveness is compromised as is contemplated by several pieces of legislation currently under consideration, who will speak for the unorganized? As the nation's largest labor union, we feel we must share in that responsibility.

Of the several OSHA modification bills presently considered, S. 2153, the "Occupational Safety and Health Improvements Act of 1980" is of the widest scope. Therefore, our comments will deal in detail with the bill's provisions. Other pieces of "OSHA improvements" legislation use S. 2153 as a point of departure, so many of our comments and observations also apply to S. 1486 and S. 1572.

Before proceeding, we would note that these bills deal almost exclusively with the safety provisions of OSHA and not the health features of the statute. If these bills were adopted, it would mean, literally, that the "S" was being taken out of OSHA.

This statement seeks to highlight and exemplify a few of the areas where we feel the passage of S. 2153 or similar legislation will be detrimental to our membership. It is not meant to be an exhaustive analysis of the bill, as other parties have adequately addressed that. Neither is it a knee-jerk reaction against any effort to amend the OSHAct as some commentators have characterized labor's response. Rather, we seek to bring to the Committee's attention some of the flaws and shortcomings that make this bill an unworkable vehicle.

Turning to the bill itself, S. 2153 is designed, according to its preamble, "to concentrate enforcement activities on hazardous workplaces and encourage self-initiative in improving occupational safety and health . . ."

This laudable task is supposed to be accomplished by exempting certain workplaces, by various criteria regarded as safe, from general schedule safety inspections and most complaint safety inspections. Employers would also be able to obtain exemption from or reduction of penalties for serious or other-than-serious safety violations if they maintained an advisory safety committee and a regular consultation program.

Our reading of the bill reveals several serious and substantial defects which, if implemented, would reduce the occupational safety protection of our membership. These major defects exist in five areas: --

1.) The use of workers' compensation statistics as criteria for exemption.

2.) The use of lost workday data as criteria for exemption.

3.) The limitation on workers' complaint investigation.

4.) The narrowing of inspection authority and scope.

5.) The treatment of advisory committees and consultants.

Each of these areas will be dealt with below.

A more pervasive problem with the bill is its departure from the current prophylactic thrust of the entire safety and health field. OSHA's recent administration has focused its resources toward finding workplace hazards and preventing occupational injuries and deaths. S. 2153 reduces the agency to a "mop-up" role, authorized to take action only after the damage is done, often at the expense of the worker. The explanation that a workplace was exempt from safety inspections because of its past record is little consolation to the worker who is maimed or killed in an occupational accident.

There exists another major flaw in the safety inspection exemption scheme presented by S. 2153, dealing with the detection of health hazards. While the bill and its sponsor take great pains to point out that health inspections and health enforcement activity are outside the scope of the legislation, the overlapping nature of health and safety point to the opposite conclusion.

Safety compliance officers are very often able to recognize serious health hazards during safety inspections and refer these hazards to health compliance officers. Safety officers, in fact, are often cross-trained in taking simple measurements of health hazards to better form judgments as to whether a health inspection is indicated. This was precisely what happened at Pepsi Cola General Bottlers, Inc., represented by Teamsters' Local 1153 in Evansville, Indiana.

During the course of a safety inspection in 1978, the compliance officers suspected overexposure to carbon monoxide in one section of the plant. A simple "detector tube" sample confirmed high exposure to this deadly gas and an OSHA industrial hygienist was contacted to conduct a full health survey which clearly defined a serious health hazard. During the health inspection, it was also determined that employees were overexposed to harmful noise levels.

These safety to health referrals are becoming increasingly common. In FY'73, only 115 such referrals took place. By FY'76, this number had risen to 571, and in FY'79, over thirteen hundred health inspections were the direct result of a referral from a compliance officer conducting a safety inspection.

Most health hazards, by their very nature, are not as evident to the untrained eye as safety hazards. Any worker can recognize the danger in using a broken ladder, but few could recognize the symptoms of carbon monoxide poisoning. Yet the safety inspection exemption provision of S. 2153 would drastically reduce the likelihood of serious health hazards being discovered in exempt workplaces. If the safety inspection at Pepsi's Evansville plant hadn't taken place, how would the carbon monoxide hazard have been detected?

- The use of workers' compensation statistics as criteria for exemption.

Section 4A(b) of the bill provides for exemptions from general safety inspections based on workers' compensation data. The Occupational

Safety and Health Administration currently uses this type of information along with several other data bases as a method of targeting its inspection resources toward high hazard workplaces. But to utilize workers' compensation statistics as the basis for exemption from safety inspection as is contemplated by S. 2153 raises a number of severe problems, both with the administrative implementation of such a program and with the use of the data itself.

Initially, there is great variation in the nature of workers' compensation data from state to state. Information from OSHA reveals that only a few states can supply the compensation data needed for the exemption provision (see Appendix A). For example, the neighboring states of New York and New Jersey have substantially differing criteria for reporting a lost workday accident. In New Jersey, all lost workday accidents are reported to the compensation program. In New York, an employee must lose eight days of work before his accident is reported. Eight lost workdays can easily be translated into twelve injured days, assuming a Friday injury and a five-day work week.

In addition to the problems raised by the variant nature of the data, it is collected on an employer-wide basis, making it inconsistent with the "safe workplace" exemption scheme of the bill. Further, exemption would be granted if an employer was absent from a list provided by the state. An employer who was late in filing or who failed to file workers' compensation reports with the state would be omitted entirely from the report to the Secretary of Labor, leading to exemption regardless of his injury rate.

Unscrupulous employers already have incentive for discouraging injured employees from filing compensation claims. Such claims are considered a liability, a non-production expense, and therefore to be avoided. A former workers' compensation adjuster at Chrysler, now an independent attorney, described a common situation. "We had a number of cases where people have operations, fingers cut off, and they bring them back the same day. It just doesn't make sense, but the statute allows you to do that and the employers take advantage of it." 1/

This type of experience is not limited to the auto industry. A Teamster Local in North Carolina reports that all injured employees of one of their companies are required to report to the company medical department on a daily basis during their convalescence. If the injured worker is too incapacitated to be returned to the job, he or she is made to remain at the medical department for the entire workday so the

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1/ Scott, Rachek, Muscle and Blood, E. P. Dutton & Co., New York, N. Y., p. 135, 6.

company does not have to file a lost workday claim. The company's name is deleted in this statement at the request of the employees, who fear retribution.

A refinement of this coercive technique exists at Exxon's Bayway Refinery at Linden, New Jersey. In an effort to reduce claims, the company has placed increasing emphasis on money prizes, drawings, contests, free dinners and other rewards for good "safety records." On the surface these devices encourage safe working practices by employees, a commendable objective. However, Local 877 reports that the main thrust of this program is to reduce lost workdays and compensation claims. Exxon has gone so far as to create an "Off-the-Job Safety Committee" to call injured employees at home in an effort to induce them back to work, often before they are fully recovered.

At present, substantial incentives exist for employers not to report lost workday accidents, including reduced insurance costs and enhanced public image. To add to this list the possibility of OSHA exemption would worsen an already bad situation. This factor, when combined with the serious administrative and procedural problems involved in the use of workers' compensation data as criteria for exemption, speak strongly against its implementation by S. 2153.

- The use of an affidavit attesting to lost workday statistics as criteria for exemption.

Section 4A(c)(1) allows employers whose workplace did not qualify for exemption under the compensation data provision to file an affidavit attesting to a specific rate of lost workday accidents per 100 employees. Employers able to establish a rate less than approximately 2 injury cases per 100 employees would receive exemption from general safety inspections for the next year.

This data base shares many of the flaws present in the workers' compensation data, including the incentive to keep reported lost workdays to a minimum. But these flaws pale when compared with the dangers of relying on a lost workday data exemption scheme. A vivid example of how such an exemption procedure would hurt our members exists at the Austin Powder Company in Portsmouth, Ohio.

Teamsters Local 159 represents the workers at this explosives plant. If S. 2153 had been in effect, this workplace would have earned exemption from all safety inspections and investigations in 1975, 1977, and 1980, even though one worker was killed in 1975, 3 workers were killed in 1977, and 3 were killed in 1978. This exemption would have been allowed under S. 2153 because in each year prior to the one exempted, there were no fatalities and the number of lost workday injuries was less than or equal to the number specified in the bill.

Year	No. of Employees	No. of Lost Workday Injuries	Fatalities
1974	435	9	0
1975	400	6	1*
1976	500	2	0
1977	500	6	3*
1978	500	(10)	3
1979	(500)	(10)	0
1980	(500)		0*

* - Exempt Years

( ) - Estimates

Another example of a dangerous workplace which could earn exemption under S. 2153 is H. F. Radandt, Inc., of Eau Claire, Wisconsin. Teamsters' Local 662 represents a number of Radandt's employees. Radandt is a construction contractor, and as such, the workforce and worksite varies from job to job. The workplace averages 100 employees per job and from 1977 through 1979 there have been no reported fatalities or lost workday injuries.

However, despite the rosy safety picture these figures suggest, OSHA inspections during this period show that Radandt isn't safe, just lucky.

In 1978, OSHA conducted two general schedule safety inspections of Radandt worksites. These inspections revealed seven " serious " and seven "other than serious" violations. By 1979, Radandt's record had deteriorated. Four general schedule safety inspections uncovered a total of 16 violations, including five "willful" and seven "repeat" citations, the most severe of OSHA's violation classifications.

Were the provisions of S. 2153 in effect during this period, Radandt would have been exempt from safety inspection, and the numerous hazards uncovered by the OSHA inspections would never have been detected . . . unless some unlucky worker found one the hard way, at the expense of his life or limb.

Over and above the inadequacy of lost workday data as a basis for exemption, lies the administrative nightmare the affidavit system would produce. OSHA would be deluged with affidavits attesting to sufficiently low lost workday rates. The clerical job of issuing exemptions would severly tax OSHA's limited administrative resources in a task that would produce no increase in occupational safety. In addition, the accuracy of these affidavits would be virtually impossible to check. The vague definition of "workplace" at Section 4A (a)(4) would allow employers to manipulate the workplace unit to increase the number of exempt employees. An employer could "hide" a hazardous worksite in a larger unit one year, the next year, sever that workplace as a "distinctly separate activity." If such manipulation takes place - as it certainly will - what happens to the safety protections of those employees?

- Complaint Procedures

Section 4A(a)(1)(c) would prohibit effective OSHA response to employee or employee representative complaints at exempted workplaces, even those formally presented in writing. Before OSHA could investigate a worker complaint, it would be required to notify the employer of the hazard. Only if the employer failed to respond with "satisfactory assurances" of abatement could OSHA inspect.

Several problems exist in this provision. Initially, it would serve to abridge one of the Act's basic purposes, the right of employees to request inspections. In the ordinary course of events, the employer has already been notified of the hazard by the exposed employee. Only upon the employer's failure to abate the hazard does the worker call OSHA.

Congress recognized this basic right to call for an inspection in writing the Act by setting out a complaint procedure and establishing protections for employees who exercised their rights under the Act. S. 2153 would not only deny OSHA flexibility in responding to complaints, it would bar any immediate inspection except in cases of death or hospitalization of more than one worker-when it's too late - or imminent danger.

In addition, it may be impossible to determine whether the employers "assurances" of abatement are "satisfactory" without an inspection. This "assurance" may be a good faith rendition of the cure. . .

or a bold face lie. S. 2153 would not allow OSHA to conduct random monitoring of employer responses. Therefore, there would be little or no deterrent to untruthful or inaccurate "assurances."

One final point concerning the complaint provision of S. 2153 is worth noting. Business, labor and OSHA have begun in recent years to educate workers and make them more aware of safety and health hazards. As this trend continues, workers themselves will become increasingly effective as a targeting tool, discovering and reporting hazards in the course of everyday employment. The most effective use of this "front line detection force" demands a flexible complaint investigation process, free to respond to the changing nature of employee complaints. A system, any system, embodied in statute, may well find itself unable to adequately protect the workers' right to a safe workplace.

- Narrow inspection scope

Section 4A(a)(3) limits the scope of inspections "to the purpose of such inspection or investigation," meaning the causes of the workplace accident or investigation of complaint. This provision would have the effect of "putting blinders" on compliance officers in the course of an inspection. Inspections of such narrow scope obviously do not allow the most effective use of compliance officer time, i.e., more travel time, less inspection time.

More importantly, the "tunnel vision" inspection procedure contemplated by S. 2153 would result in thousands of hazards which are currently being discovered in broader inspections, going undetected.

Examples of how this type of *narrow* inspection authority would work against safety are numerous. In June of 1975, OSHA inspected the Pleasants Power Station site in West Virginia. Teamsters Local 175 represents United Engineers employees employed at that site. The inspection uncovered one "willful" 17 "serious," and 32 "other" violations. However, if S. 2153 had been law at that time, these numerous violations would never have been found.

First, the entire Pleasants Power Station worksite would have been exempted from safety inspections through the lost workday scheme. According to the lost workday injury record for the previous year (30 reported injuries among 1,650 employees) Pleasants Power Station was a safe place to work.

Second, the initial OSHA investigation at the Station was a fatality investigation unconnected with United Engineers' facet of the construction job. If S. 2153 had been in place, OSHA would have been barred from inspecting outside the "purpose of such inspection or investigation," i.e., the fatalities. Therefore, the United Engineers hazards would never have been detected.

Was the Pleasants Power Station a safe worksite as S. 2153 says it was? No. The fatality investigation leading to the United Engineers inspection was to determine the cause of the cooling tower collapse which sent 50 men to their death at Pleasant Station, Willow Island, West Virginia. Fifty men died in the Willow Island disaster, yet this was a safe workplace as defined by S. 2153.

- The use of advisory Safety Committees and Consultation Programs as criteria for penalty limitation.

Sections 4A(d), (f) and (g) provides various penalty exemptions and limitations for employers who maintain an advisory safety committee and a regular consultation program. At least two pitfalls are contained in this proposal, one dealing with the nature of joint safety committees, the other with the bill's procedural framework.

Joint management-labor committees play a vital and indispensable role in improving occupational safety. The International encourages locals to negotiate such committees into their contracts, and provides for similar committees on a national scale.

However, our experience has proven that joint committees cannot take the place of statutory protections. If an employer wishes to circumvent or ignore the safety committee, it is a simple matter to do so. An example typical of our experience involves Teamsters' Local 877, representing the employees of Exxon's Bayway Refinery at Linden, New Jersey. A joint labor-management safety and health committee is required by contract at this workplace, and each of the qualifying conditions for the "advisory" committee proposed under S. 2153 are present.

During the early morning hours of March 20, 1979, an explosion and fire occurred in one section of the plant. Five workers were injured, and two were hospitalized with serious burns. The Union committee members were not informed of the explosion and discovered the news themselves after reporting to work on the day shift. Exxon's cooperation with Union members of the safety committee is a lesson in obstruction. The company refused to share any of its information concerning the explosion, company safety professionals would not cooperate with the union members or even discuss their investigations, and union members were barred from questioning key metal pipe inspection personnel. Finally, when OSHA compliance personnel investigated the explosion site, company lawyers barred any private conversations between employees and OSHA personnel until threatened with a willful violation of the OSHAct. Yet, Exxon fully qualifies for S. 2153's penalty exemptions through establishment of a safety committee.

A secondary effect of S. 2153's penalty reduction provision would be to actually discourage employee participation in joint safety committees. When employees or their representatives are faced with a "sham" joint committee similar to the one at Exxon's Bayway facility, they will find it necessary to refuse to serve on it in order to keep a semblance of teeth in OSHA enforcement proceedings. Under S. 2153, we may see the ultimate irony - unions negotiating to remove joint safety committee contract clauses which only a few years earlier they fought hard to win!

When Congress passed the Act nearly a decade ago, it recognized the complexities involved in dealing with safety and health issues. From 1961 to 1971, the manufacturing injury rate had increased about 35 percent and Congress had to respond to this waste of human resources.

In order to meet the challenge of improving occupational safety and health protection, an administrative agency was created. The hallmark and strength of such agencies is their flexibility and capacity for responding to changing conditions. To hamstring this flexibility in a legislative framework like S. 2153 would be to take away OSHA's greatest asset.

Congress recognized that it could not anticipate in 1970 what specific measures would be most suitable to promote safety and health in 1980. Neither should Congress now attempt to lock OSHA into an enforcement framework inadequate to address real world problems.

APPENDIX A

Features of Workers' Compensation Programs Needed to Provide Data for S. 2153

State	All Workers Covered	Min. IWD for Reporting	Employer Address or I.D. Number	Automated	Data Confidentiality Restrictions
Alabama		4			
Alaska	X	All	X	X	
Arizona		All	X	X	X
Arkansas		8	X	X	
California		All	X	X	
Colorado	X	3	X	X	
Connecticut	X	2			
Delaware	X	All		X	
District of Columbia					
Florida		All	X	X	
Georgia		6	X	X	
Hawaii		2	X	X	
Idaho		All	X	X	
Illinois		2			
Indiana	X	2		X	
Iowa	X	4	X	X	
Kansas		2		X	
Kentucky		8	X	X	
Louisiana	X	—			
Maine		All	X		
Maryland	X	4		X	
Massachusetts		All		X	
Michigan	Almost All	8	X	X	

Features of Workers' Compensation Programs Needed to Provide Data for S. 2153

State	All Workers Covered	Min. IWD for Reporting	Employer Address or I.D. Number	Automated	Data Confidentiality Restrictions
Minnesota	X	4		X	
Mississippi		6		X	
Missouri		All	X	X	
Montana		All	X	X	
Nebraska		All	X	X	
Nevada		All	X	X	
New Hampshire		All			
New Jersey		All		Partial	
New Mexico		All	X	X	
New York		8		X	X
North Carolina		2	X	X	X
North Dakota		All	X	X	X
Ohio		7	X	X	X
Oklahoma	X	All		X	
Oregon		4	X	X	
Pennsylvania	X	All	X	X	
Rhode Island		4			
South Carolina		7			
South Dakota	X	All	X	X	X
Tennessee		8	X	X	
Texas		All		X	
Utah	X	All	X	X	
Vermont	X	All		X	
Virginia		All	X	X	
West Virginia	X	All	X	X	
Washington	X	All	X	X	
Wisconsin		4	X	X	
Wyoming		All	X	X	

Communications Workers of America

GLENN E. WATTS, President

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April 24, 1980

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SENATOR WILLIAMS, N.J.
1980 APR 28 AM 9 34

The Honorable Harrison A. Williams, Jr.
Chairman of the Senate Committee on
Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find testimony which the Communications Workers of America is submitting for the permanent printed hearing record with regard to the recent hearings on OSHA legislation, especially S. 2153.

Thank you for your cooperation with this request.

Sincerely,

Glenn E. Watts

Glenn E. Watts
President

Enclosure

Testimony Submitted
by the
Communications Workers of America
to the
Senate Committee on Labor and Human Resources
on
S. 2153
the Occupational Safety and Health Improvements Act.

The Communications Workers of America, an AFL-CIO union representing more than 625,000 workers in collective bargaining is pleased to present testimony on S.2153, the so-called "OSHA Improvements Act of 1980".

The Occupational Safety and Health Act of 1970 states its principal purpose and policy is to assure every working man and woman in the nation safe and healthful working conditions. During the first six years of OSHA's existence (the Nixon and Ford Administrations), the agency was vastly underfunded, understaffed, and, in general, prevented from accomplishing its stated objectives. In 1977, President Carter appointed Ray Marshall, Secretary of Labor, and Eula Bingham, Assistant Secretary for Occupational Safety and Health. Since then, the Occupational Safety and Health Administration has begun to truly be administered in the best interests of American Workers; the Congressionally designated recipients of improved occupational safety and health.

OSHA was created to harness efforts to prevent occupational injuries, fatalities, and disease by utilizing the means provided by Congressional and private sector efforts. This administration has proved that thorough enforcement of the Occupational Safety and Health Act, compliance assistance programs for employers, scientific and technical assistance to interested parties, the development and promulgation of health and safety standards, promotion of the theory of worker participation, strengthening state safety and health programs, and employee/employer education concerning occupational safety and health hazards workplace injuries, fatalities, and diseases can be substantially reduced.

In fact Bureau of Labor Statistics' data indicate that worker fatalities have decreased 10 percent and thousands of workers have been spared serious injuries as a result of OSHA's activities. In addition, workers and employers have become much more aware of workplace occupational safety and health hazards.

The Communications Workers of America believes the Occupational Safety and Health Act needs to be improved, but such improvement should occur within the present structure of the Occupational Safety and Health Administration. S.2153, presently being considered by the Senate Labor Committee, would severely weaken OSHA.

The recurring occupational safety and health hazards at America's workplaces cry out for more OSHA activity rather than a massive withdrawal of the law's basic protection. For example, 100,000 workers die each year from occupational diseases, while another 390,000 develop job-related illnesses. About 14,000 disabling injuries occur annually, It is estimated that between 20 percent and 40 percent of all cancers are related to occupational factors. Indeed, exclusion from OSHA coverage can precipitate a dramatic increase in workplace fatalities. After

Congress had removed some "small" businesses from OSHA's coverage, deaths due to injuries in establishments with 19 or fewer employees doubled from 962 to 1,926 between 1976 and 1977.

Under S.2153, OSHA's presence at a worksite would generally be permitted only after a death or serious injury has taken place. This proposed procedure would be similar to a policy of installing traffic lights at an intersection only after a fatal automobile accident has occurred there.

The operating premise underlying the proposed legislation is that state worker compensation data combined with employer "good faith" voluntarism will provide sufficient protection for America's wage earners. Under the Schweiker proposal, the employee, the chief victim of workplace safety abuse, would be relegated to a passive status, unable to trigger federal inspections.

The chilling effect that this would have on OSHA inspections can be illustrated by reviewing OSHA's activities in a recent year. In fiscal year 1978, OSHA investigators inspected 22,969 worksites which had 50 employees or more. OSHA employees in that year conducted a total of 57,211 investigations, of which 21,488 or 30 percent were triggered by worker complaints. More OSHA investigations occurred as a result of worker complaints than were due to any other cause. Yet under the Schweiker Bill, the overwhelming majority of safety inspections arising from worker complaints would be prohibited.

S.2153, would require state workers' compensation agencies to submit annually to the Secretary of Labor a listing of all employers within each state who during the preceding year had one or more occupational injuries reported to the state workers' compensation agency. Each report would have to include all occupational injuries resulting in two or more lost workdays. Any workplace subject to the state workers' compensation law but not included in the listing submitted to the Secretary of Labor would be exempt from OSHA coverage.

S.2153 would thus exempt approximately 90 percent of all workplaces employing 43 million workers from most OSHA safety inspections. In marked contrast, the current law provides OSHA protection for 98 percent of all businesses with 100 or fewer employees.

In addition employers who do not meet the lost workdays safety standard would be exempt from almost all federal safety inspections if they file an affidavit with the Labor Department stating that there were no employee deaths during the previous year caused by occupational injuries and if they had a number of lost workday injuries less than or equal to the tolerance levels set forth in the following table:

Number of Employees	Number of Lost Workdays
1-25	0
26-49	1
50-99	2
100-149	3
150-249	5

Number of Employees	Number of Lost Workdays
250-349	7
350-449	9
450-649	13
650-999	20
1,000 and over, two injuries per 100 employees	

A major problem with S.2153 is that no state workers' compensation agency now compiles lost workday information by "workplace." Data collection of this type would be extremely difficult and perhaps impossible to implement. For example,

--Seven states do not collect any information on worker injuries;

--Reporting procedures among the other 43 states vary to such an extent that any uniformity in data is impossible to obtain;

--Twenty-four states collect data on only a portion of all injuries/illnesses that occur in a given calendar year;

--Fifteen states do not have employer identification codes;

--Fourteen states allow numerical exemptions from workers' compensation coverage; and

--Some states do not provide workers' compensation coverage for all workplaces.

Another ominous feature of the legislation is that it would allow employers who are exempt from OSHA-administered inspections to escape the usual penalty fines levied by OSHA when violations do occur. Exempt employers could not be fined even for serious violations if the employer had established a safety advisory committee which included worker representation and if the employer was involved in an OSHA advisory consultation program.

Along a similar line, an employer who was not exempt from OSHA inspections but who had set up a safety advisory committee and was participating in an advisory consultation program could be fined only up to $700 for each serious violation and $300 for each non-serious violation. Under current law, an employer can be fined up to $1,000 for each serious OSHA violation.

Another disturbing section of the proposed legislation restricts the scope of any OSHA inspection in workplaces to the particular situation which "justifies" the investigation. OSHA would thus be prohibited from expanding an inspection of a fatal or serious accident to a "wall-to-wall" inspection of the entire workplace. Similarly, OSHA inspectors would be denied the right to expand a health inspection to include an inspection for safety violations.

The Bill would further restrict the scope of OSHA inspections by requiring that "where distinctly separate activities are performed at a single physical location, each activity shall be treated as a separate workplace". Thus, different operations in a plant would be different workplaces. For CWA members who work in such hazardous places as manholes and microwave-radio frequency transmission towers, this means that each workplace would be defined separately even though workers assigned to perform the work are dispatched from and report to a central office.

A most disturbing element of S.2153 from the viewpoint of the Communications Workers of America is the effect the Bill would have on the Union's membership, particularly those employees working within the telecommunications industry. According to Bureau of Labor Statistics' injuries and illnesses data, the telecommunications industry is relatively safe. CWA feels this data does not represent a true picture of the occupational safety and health hazards to which the Union's members are exposed. For example, approximately 35,000 CWA members work with asbestos products, proven carcinogens; approximately 43,000 CWA members work on jobs which expose them to carbon monoxide; approximately 45,000 CWA members work with lead while performing their jobs; approximately 45,000 CWA members are exposed at work to cancer-producing agents known as isocyanates; approximately 350,000 CWA members are exposed to ionizing and non-ionizing radiation in their jobs' performance; approximately 45,000 CWA members are exposed to another carcinogen, arsenic, while at work; approximately 60,000 CWA members work in jobs in which they may suffer exposure to the carcinogens polychlorinated biphenyls and cleaning agents/degreasers such as carbon tetrachloride, methyl ethyl ketone, and trichlorethylene; and approximately 25,000 CWA members suffer work-related exposure to vinyl chloride and polyvinyl chloride, also cancer producing agents.

However, under S.2153, most employers in the telecommunications industry would be classifed as so-called "safe" businesses. Given the above types of workplace exposures to cancer-producing and toxic substances, the outrageously regressive character of S.2153 is identified.

The Communications Workers of America firmly believes that S.2153 would turn back the clock so as to endanger the well-being of employees involved in telecommunications as well as other industries. We urge the Committee to oppose all efforts to enact S.2153 into public law during the remaining days of the 96th Congress.

Office of the Vice President

GRAPHIC
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INTERNATIONAL
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April 17, 1980

The Honorable Harrison A. Williams, Jr.
Chairman, Senate Committee on Labor
and Human Resources
G-237 Dirksen Senate Office Building
Washington, D.C. 20510

RE: S. 2153

Dear Senator Williams:

Pursuant to instructions from your Committee, enclosed please find three copies of a written statement by the Graphic Arts International Union, AFL-CIO, CLC, on S. 2153.

We understand that this statement will be part of the written record of your Committee's hearings on S. 2153. We regret that we were unable to appear and testify before the Committee.

Very truly yours,

Leon

Leonard E. Adams
Vice President

LEA:ks
opeiu#2aflcio
cc: George H.R. Taylor, Director
Department of Occupational Safety and Health,
AFL-CIO

Affiliated with American Federation of Labor/Congress of Industrial Organizations • Canadian Labour Congress

STATEMENT OF THE
GRAPHIC ARTS INTERNATIONAL UNION, AFL-CIO, CLC,
BEFORE THE
U.S. SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
ON S. 2153, "THE OSHA IMPROVEMENTS ACT OF 1980"

This statement is presented on behalf of the Graphic Arts International Union, AFL-CIO, CLC.

The GAIU has 130,000 members throughout the United States and Canada, approximately 250 affiliated Local Unions, over 50 schools in which are taught not only the skills of the trade, but basic safety and health procedures, and a vigorous OSHA funded program of educating our members and employers of the dangers in the industry, and ways to improve safety and health in the work place.

The GAIU is opposed to S. 2153, most inappropriately entitled "The OSHA Improvements Act of 1980," for several reasons:

First, it would strip the protection provided by OSHA from a large number of workers in the industry;

Second, it would eliminate the imposition of penalties for violations in the graphic arts industry upon a large number of employers in the industry;

Third, it would blunt the effectivenss of the New Directions Program of OSHA, which has been highly beneficial to our members by alerting them to safety and health hazards, and enabling the Local Unions and employers to work out a mutually satisfactory solution to these problems; and

Fourth, it would undercut the effectiveness of OSHA's efforts in the health area, further endangering the lives of our members and workers in the industry.

This statement is specifically based upon the adverse impact of S. 2153 upon the safety of workers in the graphic arts industry.

Nature of the Graphic Arts Industry

The graphic arts industry is the eighth largest industry in the U.S. economy in terms of total employment. Annual sales total more than $68 billion. It employs more than 1,100,000 people, and there are graphic arts establishments in virtually every State of the Union. Graphic arts workers produce everything from magazines and newspapers, books and catalogues, bonds, stocks and stamps to rotogravure Sunday newspaper supplements, advertising, greeting cards, lithographed and photoengraved works of art, patterns on linoleum and wood panelling, and packaging, commercial binding and mailing.

There are 40,000 firms in the graphic arts industry. It is a highly technological industry, requiring the rapid introduction of high speed modern equipment, the use of chmicals and inks, and a trained and skilled workforce. According to the Department of Commerce, of the 1,100,000 employees in the industry, 80 percent are employed in shops of 20 or less, and 67 percent work in shops with 10 or fewer employees. These statistics are highly significant under S. 2153 because the exemptions from safety inspections and penalties are keyed to the number of employees and the breakdown into "work places."

The picture of the industry, both union and non-union plants, is one of thousands of small shops, using high speed, technologically advanced equipment, chemicals and materials, to produce a wide variety of products. The industry is highly competitive and the emphasis is on production -- not on safety.

Safety Problems in the Graphic Arts Industry

Generally, workers don't die from accidents in our industry -- they get maimed. It was and still is common for workers to lose fingers and hands in presses and cutters. One only has to go into a pressroom or bindery and shake hands with people to see that many workers are missing fingers. Most of the presses used in the industry, unless equipped with the proper protective guards on the machine, can cause maiming crush injuries by catching operators' fingers and hands in the rollers.

Another widely used piece of equipment found in binderies is the guillotine cutter. As the name implies, the machine has a large 60-inch long razor-sharp guillotine-shaped blade, weighing almost 80 pounds, which is raised pneumatically and comes down with sufficient force to cut stacks of paper anywhere from a single sheet to 6 inches in thickness. Again, without the proper protective controls, this machine and had has been a principal cause of severe injuries to bindery operators.

Other pieces of standard bindery equipment are 3-knife trimmers, perfect binders, gathering machines, saddle stitchers, and other high speed equipment, all of which have pinch points which could either crush or amputate fingers. Due to the high rate of production most employers demand, workers frequently do not take the time or many employers do not provide proper safeguards.

Injuries caused by such equipment are serious, permanently crippling and tragically unnecessary. It is possible to have such equipment installed with proper guards to protect workers. For example, the guillotine cutter can have controls which bring the blades down only if both of the operator's hands are on controls away from danger. Presses can be equipped with guards and protective devices. Not all employers in the graphic arts industry, however, have installed the machines with these proven safeguards. Our industry is one of small shops, dangerous equipment and the availability of safeguards to avoid maiming injuries.

Under OSHA, as it is presently in effect, workers in the graphic arts industry have recourse to the federal government to compel their employers to correct dangerous operating conditions, by proven equipment modifications, which other employers have already adopted. Under S. 2153, this protection would, in large part, be taken away.

For example, fully 67 percent of graphic arts plants, or 26,800 shops, employ 10 or fewer workers. The typical small bindery has cutters -- the typical small print shop has presses. Yet, under Section 4A(d)(1)(B) of S. 2153, if a worker in such a shop lost a hand in the cutter or suffered a finger crush injury, his employer would be exempt from any penalty during the year such an injury occurred. There is no logic underlying such an exemption. It removes any financial incentive an employer might have to install protective guards on dangerous machines. It improperly puts the burden on the employee who suffered the maiming injury, rather than upon the employer who profitted from use of the machine and the employee's labor.

More importantly, in addition to removing the penalty, S. 2153 would severely limit the protection currently available under OSHA.

Traditionally, in the graphic arts industry, there have been well-established departments, regardless of the size of the operation. Such departments are normally the prep department, the press department, the bindery department, and the finishing and mailing department. S. 2153 would take these departments and, in effect, convert each one into a separate entity, like a different little company, for the crucial purpose of determining the qualifications for exemption from all safety inspections and investigations. The definition of "work place," contained in Section 4A(a)(4) to include "distinctly separate activities...performed at a single physical location...," appears to include the different departments of a typical graphic arts operation. The effect of this Section of S. 2153 on worker safety would be devastating.

To take a typical case, assume ABC Printing and Binding Company employs 20 people. Assume further it has two high speed presses and a guillotine cutter, and none of the equipment has any of the safety modifications used in the industry. If S. 2153 were passed and there were no accidents in 1980 resulting in lost workdays, ABC Printing and Binding would be exempt from inspection and investigation under Section 4A(a)(1) no matter how dangerous the continued use of the presses and cutter is, except by action of the Secretary of Labor. If, in 1981, a worker lost a hand on the guillotine cutter and the accident was reported by the State Workers Compensation Agency, ABC Printing and Binding would lose its immunity under S. 2153 from inspection and investigation only as to the bindery. It could continue to maintain dangerous press operations. And if an OSHA inspector were in the plant to look at the cutter, the inspector would not be entitled, under S. 2153, to investigate dangerous safety conditions in the press department.

If, in 1982, a finger crush accident occurred on a press and was reported to the Workers Compensation Agency, the exemption would be lost as to the press department "work place" only for 1983. ABE Printing and Binding, by then, under S. 2153, would have become exempt from inspection and investigation for its "bindery" work place, not having sustained any occupational injuries on the bindery side in 1982.

S. 2153 would permit a wilfully negligent employer to obtain ~ and continue to have an exemption from inspections and investigations, despite a record of maiming injuries, by using the fiction that separate tasks within the same plant, at the same location, with the same owner, constituted separate "work places." Such a distinction has no basis in either logic or reason, it is especially shocking because it would permit the same management, earning the same profits for the same entity, to escape the consequences of its decision not to install safety controls on any equipment.

Adverse Impact on OSHA's New Directions Program

The overall effect of S. 2153 would be not only to lessen protection of workers, but to destroy their belief that they can turn to OSHA for protection. The employees at a plant such as ABC Printing and Binding, having seen unsafe conditions exist and result in maiming injuries to their fellow employees, while their employer remains immune from safety inspections, could not help but conclude that OSHA was ineffective, if not irrelevant, to them.

This would seriously undercut participation in the OSHA New Directions program, which was designed to increase employee and employer awareness of safety hazards, and participation in efforts to make the plant a safer place to work. The program, by utilizing employers and workers, has helped to alleviate the serious shortage of OSHA inspectors and was in response to the obvious problem that there never would be enough federal inspectors to investigate every work place.

The GAIU has been a participant in the OSHA New Directions Grant project. We have developed what we believe to be an excellent format for graphic arts worker and employer education. We are proud of our program. We call it SHAPE -- Safety and Health Awareness Program for Employers and Employees. As part of the program, we are working closely with management representatives to reach a mutual understanding of the dangerous conditions in our industry and ways to correct them. We have worked with the University of Wisconsin on a survey of our industry, which, incidentally, revealed an industrywide, abnormally high incidence of strains and sprains affecting the trunk of the body. We have developed an eight-session safety awareness program, and are embarking upon a research project with the University of Michigan on safety in our industry. The GAIU strongly believes that industry participation in the OSHA New Directions projects, such as SHAPE, would be severely cut back by passage of S. 2153 because participation is based upon the effectiveness of OSHA and the belief that workers and employers can, together, have a meaningful impact on safety of working conditions. If some employers can skillfully manipulate definitions of "work place" to avoid what common sense dictates are necessary inspections, then common sense will also dictate that participation in a New Directions Program is a waste of time.

Erosion of OSHA's Impact on Health in the Graphic Arts Industry

S. 2153 does not deal directly with OSHA's setting of health standards. But the bill, if passed, would have a drastic impact on OSHA's long range programs to discover and ultimately prohibit the use of substances which cause fatal illnesses to workers in later life. The bill strikes at the effectiveness of OSHA as an agency, at a time when the agency was just beginning to acquire the confidence of our members in the graphic arts industry. If OSHA is not perceived as being able to protect the workers from the immediate hazards of the work place, it will not otbain the necessary cooperation from the workers, unions and employers to deal with long range consequences. The GAIU is opposed to S. 2153 because, in fact, it strips away the power of OSHA to move swiftly, by unannounced safety inspections, to correct dangerous working conditions. OSHA has become effective precisely because it has the power and is perceived to have the power to have an immediate impact on working conditions. Without this power, then the vital functions OSHA currently performs in the health area, determining and setting standards, will also be severely diminished.

For example, the graphic arts industry has several major potential health hazards. There are the unknown effects from the constant exposure and use of toxic chemicals used in film preparation and rotogravure operations. Unfortunately, experience has already taught us that benzene, a common agent used in most printing plate processes, is a known carcinogen. Another toxic chemical is carbon tetrachloride, commonly used in commercial printing plates. Exposure to it causes liver cancer. The usual substitutes for carbon tet, such as methylenechloride and trichlorethene, used in industrial solvents and cleaners, are less toxic. Exposure to them, however, accelerates liver and kidney diseases. Overexposure to carbon tet substitutes can also cause central nervous system depression, lightheadedness, dizziness and lack of coordination.

A new photoengraving process, Grace Letterflex, using polymer plates, has been found to cause serious skin rashes and other dermatological problems. The Graphic Arts International Union, in cooperation with NIOSH, and the equipment manufacturer, were able to develop ventilation standards which protected the operators and maintained the product quality of the equipment.

We are currently studying the impact of noise in the press room on workers. A press room is a place where one must continually shout to be heard over the din of high speed presses.

The GAIU is concerned that S. 2153 will be the beginning of the end of OSHA's efforts in the health area, at the very time when meaningful progress is being made in the graphic arts industry. We cannot permit this to happen.

CONCLUSION -- OSHA as a Political Issue

Workers in the graphic arts industry have been living with safety and health problems for a long time. Unfortunately, some have been dying from the hazards, too. In the past, say 20 years ago, lost fingers or hands, and roller crush accidents, were simply an accepted risk of employment. If the injury was not too severe, the employee might get another job in the plant, a maimed reminder of what could happen. Deafness of pressmen and early death from cancer of people who had worked with benzene and carbon tet were not thought to be attributable to working conditions.

Today, our members know better. Through programs like SHAPE, they have become aware of safety and health hazards. They have become aware of what can be done and employers too have recognized that conditions can be improved and that safety is not just a "worker" concern.

Nor is it a pro-labor or anti-labor, Republican or Democrat issue. In recent weeks, the struggle over S. 2153 has been characterized as one between big business and labor, pro-labor Members of Congress versus anti-labor Members. We do not believe that the issue of worker safety and health can be so glibly divided along such lines.

In 1975, at our annual Convention, held that year in Toronto, Stephen Lewis, then leader of the New Democratic Party in Ontario, addressed our delegates. He spoke about worker safety and health hazards -- from uranium mining and miners dead from lung cancer, of asbestos manufacturing and workers and their families stricken with silicosis and asbestosis, and mesothelioma, and lung cancer, of lead manufacturing and emissions which got into the blood of small children, as well as affecting the workers, and rubber workers and the fatal effects of polyvinyl chloride cancer.

And he concluded with the thought that he may have ideological differences with members of other political parties in Canada, about the reasons for poverty or advisability of labor legislation, but, he asked,

> "How can you have a philosophic difference about the life and health of working people? It's not a matter of social philosophy, it's a matter of simple, elemental, moral behavior."

And that is the way we look at S. 2153. It is a bad bill because it limits the protection the government now provides for workers' safety and health. It removes financial penalties for failure to install safe equipment. It undermines OSHA's efforts to involve management and labor in the workers' well-being. And, ultimately, it will have disastrous consequences on OSHA's ability to maintain an effective health program.

This statement has been based upon our observations as a union in the graphic arts industry and our involvement with OSHA projects. The GAIU has special expertise as to the processes used in the industry. The GAIU also is particularly able to show that typing safety inspections and investigations to the number of lost workdays of employees in small shops or large shops, broken down artifically into small "work places," would eliminate entirely safety protection for workers employed in such shops. In our industry, it would automatically and irresponsibly exempt 26,800 shops with 10 or fewer employees, from any penalties whatsoever, regardless of the wilful, negligent and dangerous behavior of the employers. It would, automatically and illogically, ensure that the 32,000 plants with 20 or fewer employees, divided into artificial "work places," would be exempt from OSHA safety inspections and investigations.

We cannot accept the sacrifice of these workers' safety and the well-being of their families in the name of "OSHA Improvement." S. 2153, if passed, would, quite simply, strip away the basic protection employees in the graphic arts industry have had under OSHA. There is no justification for this and we urge that S. 2153 be defeated.

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Center to Protect Workers' Rights

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Robert A. Georgine, President

STATEMENT OF ROBERT A. GEORGINE
PRESIDENT OF THE BUILDING AND CONSTRUCTION
TRADES DEPARTMENT OF THE AFL-CIO

BEFORE THE
SENATE LABOR AND HUMAN RESOURCES COMMITTEE

April 25, 1980

My name is Robert A. Georgine and I am appearing here on behalf of the Building and Construction Trades Department of the AFL-CIO which is composed of 15 affiliated unions and represents approximately 4 million of this nation's construction workers and the Center to Protect Workers' Rights which is the research organization of the Building and Construction Trades Department.

I thank Chairman Williams for the opportunity to present testimony of vital consequence not only to our members in the construction industry but to the health and well-being of our economy as well. Let me say at the outset that I have encountered few legislative issues about which rank-and-file building trades workers feel so strongly as the integrity of the program authorized by the Occupational Safety and Health Act of 1970. The enthusiastic response of our members to the Building and Construction Trades Department's safety and health training programs over the past years is testimony to their genuine concern about workplace protection.

Opposition to S.2153

It is because of this concern for workplace safety that we appear before this committee today to express our unequivocal opposition to the so-called "Occupational Safety and Health Improvement Act of 1980." We find nothing in S.2153 which guarantees occupational safety. Nor do we find any "improvements" that would promote greater voluntary compliance with the Act.

The Occupational Safety and Health Act was intended to provide full protection of the law for all workers in the private sector. The bill would undermine this goal by exempting most employers from the fullest enforcement of the Act. Since the job hazards faced by construction workers are primarily safety hazards, we strongly reject the bill's attempt to weaken OSHA enforcment of its safety standards.

Unique Safety Problems Experienced by Construction Workers

Construction workers experience injuries and illnesses at a rate 15 percent greater than the next most hazardous industry, manufacturing. Although construction employs about 5 percent of the nation's workforce, it accounts for over 20 percent of all job-related fatalities. Construction workers lost more than 945,000 working days in 1978 as a result of job injuries alone. Studies by the National Institute of Occupational Safety and Health (NIOSH) and the National Safety Council (NSC) estimate that construction accidents and illness in 1978 cost over $8 billion in property damage, lost wages, insurance payments, and worker compensation payments.

Construction work poses unique safety problems for many reasons:

- The construction industry consists of numerous temporary and constantly changing work sites. The Bureau of Census estimates that there may be as many as one million construction projects underway at any one time in the United States.
- Each site involves many different small employers performing separate trades in close proximity to each other.
- Working surfaces, machinery, trenching and scaffolding are constantly moving and being reassembled modified and disassembled, and thus new hazards are continually emerging. In addition, construction workers are frequently changing worksites and employers.

FLAW #1: REGULATION BY EXEMPTION

Because construction presents such unusual health and safety problems, we in the building trades are disturbed by a fundamental flaw in S.2153, namely, its attempt to regulate by exemption. In enacting the Occupational Safety and Health Act in 1970, Congress deliberately included under OSHA's jurisdiction the workplaces of every private employer. Yet S.2153 violates this original intent. It seeks to "legislate away" a problem simply by excluding certain workplaces from the fullest protections of OSHA. Exempting a large portion of all employers from inspections will not guarantee a safe workplace.

If we are serious about ensuring a safe and healthy workplace for all Americans, as mandated by the Act, more funding for OSHA is necessary. For an agency that preserves and protects the "human capital" of our country, OSHA's annual budget of $183 million is very small compared to other federal agencies. More money is needed for conducting inspections and for training compliance officers in high hazard industries, such as construction. There should also be stiffer penalties for repeated and willful violations and quicker resolution of contested cases.

There is no disagreement that OSHA should focus its resources where they are most needed. We in the Building and Construction Trades agree that OSHA should target its enforcement resources to the more dangerous workplaces. Although the present administration has made important strides in this direction, we still believe that construction in particular needs more attention from OSHA.

S.2153 will not provide for the appropriate targeting of OSHA's resources. Simply exempting certain employers from OSHA inspections will not ensure that OSHA's limited resources are used where they are needed most. Instead, new legislation mandating inspection priorities for OSHA leaves the Secretary with no flexibility to devise new strategies or priorities as new needs and problems arise. OSHA's current "high hazard targeting model" uses a number of different criteria and data sources to inspect the 2 percent of the firms covered by the Act which have the highest injury rates. OSHA should be allowed to develop administratively various targeting systems based on its experience and changing workplace problems and conditions. The Secretary should not be placed in a legislative straightjacket.

The Senate Labor and Human Resources Committee could and should ensure that OSHA continues to effectively direct resources through oversight hearings, such as those held last month.

FLAW #2: PAST SAFETY DOESN'T PREDICT THE FUTURE

The OSHA Act is based on the principle of preventing injuries and illnesses by eliminating hazards. S.2153 alters this basic assumption of the original legislation by permitting most inspections only after a certain number of injuries have taken place. The bill mistakenly focuses on the accidents, after they have happened, rather than on the causes of the accidents. A low accident rate for an employer during one year can be ascribed to luck as easily as to compliance with the Act. More importantly, a low injury rate during one year does not guarantee safety in the future, especially if new, more dangerous equipment, materials, or methods have been introduced--as is commonplace in construction.

Two examples illustrate our point. On April 27, 1978, 51 construction workers lost their lives when the scaffolding fell from the cooling tower under construction at the Willow Island Power Plant in St. Mary's, West Virginia. The general contractor on the site, Research Cotrell Co., was charged with six serious violations of OSHA standards and ten willful violations. YET RESEARCH COTRELL'S GOOD SAFETY RECORD AT THAT SITE FOR THE PREVIOUS YEAR--ONLY TWO LOST WORKDAY INJURY CASES--WOULD HAVE EXEMPTED IT FROM GENERAL OSHA INSPECTIONS UNDER S.2153.

Another example involved the Forked River Nuclear Plant in Forked River, New Jersey. On March 12, 1979, a 75-foot steel pedestal collapsed at the construction site. One man was killed and other hospitalized, both members of Operating Engineers Local

Union 825. OSHA cited three contractors -- G & H Steel Co., Stone & Webster, and Morrison-Knudsen Co. -- for willful violations of a standard requiring proper guying and support for reinforcing steel. Each contractor contested the citations, which were upheld last November. ALL THREE OF THE CONTRACTORS HELD RESPONSIBLE HAD SAFETY RECORDS DURING 1978 -- ACCORDING TO OSHA FILES -- WHICH WOULD HAVE QUALIFIED THEM FOR INSPECTION EXEMPTIONS UNDER S. 2153.

FLAW #3: RELIANCE ON WORKER COMPENSATION STATISTICS

Even if a past safety record were a good indicator of future hazards, it would be unreasonable to base changes in the Act on the unreliable statistics of the worker compensation system. "Lost workday" figures have never accurately reflected actual job injuries or illnesses. Injury records kept by employers vary depending upon the reporting requirements of insurance companies and state worker compensation agencies, how well OSHA enforces its record-keeping regulations, and how well unions monitor employers. There is no uniformity between the reporting requirements of the different state workers compensation laws. Employers also manipulate injury rates by keeping injured workers on the job. Ironically, S.2153 would provide an additional incentive for employers to avoid reporting injuries and for keeping injured workers on the job.

Using worker compensation records as a way to decide which employers will be exempt from inspections will not work in the construction industry. Worker compensation records are not generally maintained for each separate worksite. The data is identified by employer only, regardless of the number of worksites. Since construction employers have numerous worksites, it would be impossible to target a particular high-hazard site by relying on worker compensation statistics, as intended by the definition of "workplace" in S.2153. In the construction industry, worker compensation statistics would be unreliable for another reason -- employers often create separate corporations to handle different construction projects.

FLAW #4: VOLUNTARY COMPLIANCE UNDERMINED

We believe that voluntary compliance is the key to effective OSHA enforcement. We recognize, however, that no voluntary enforcement system can work effectively without the threat of government enforcement to back it up. OSHA now encourages voluntary compliance by conducting random inspections and inspections in response to worker complaints. Another powerful incentive for voluntary compliance is the element of surprise. Employers who can count on prenotification of an inspection have much less incentive to remedy hazards until an inspection is imminent, especially if they know they will have an opportunity to delay inspection and compliance through lengthy litigation. That is why advance notice of inspections is presently prohibited in most circumstances and it is a criminal violation for anyone to give advance notice without authorization from the Secretary.

Unfortunately, S.2153 would severely undermine the voluntary compliance process as it presently operates. Under the bill, a qualifying employer would be completely exempt from random inspections and the Secretary would be severely limited in his discretion to respond to worker complaints. Except in the case of serious accidents, imminent danger, or followup inspections, the Secretary could respond to a complaint only after the employer had been notified by the Secretary of the complaint and the employer had failed to provide satisfactory assurances that the violation had been corrected. This reversal of policy contained in S.2153 will cripple the present voluntary enforcement process under OSHA.

Supporters of S.2153 note that the bill will encourage the creation of voluntary labor-management safety committees. The Building and Construction Trades Department has always encouraged the development of labor-management health and safety committees. They can be a useful and effective way to promote workplace safety. Since employers who create such committees under S.2153 will have lighter penalties if they violate the law, we can be certain that more committees will be created.

In and of itself, however, this proliferation of safety committees will not improve safety conditions because none of the recommendations and findings of committees are binding on the employer. Indeed, workplace hazards brought before a safety committee can be ignored with no penalty or threat of OSHA intervention. The bill goes so far as to provide that inaction or complaints brought before a safety committee cannot be considered as evidence of a "willful violation" of an OSHA standard. The voluntary compliance system as reconstituted by S.2153 will work only to absorb complaints about workplace hazards, not to resolve them.

FLAW #5: A BUREAUCRATIC NIGHTMARE

In the name of streamlining OSHA enforcement, S.2153 permits employers with a "safe" record over the past year to certify their workplaces as safe. Several problems with this approach are obvious. To require an affidavit for every workplace in the entire nation will create a massive paper glut and administrative nightmare.

S.2153 will require that OSHA resources be diverted from enforcement to shuffling meaningless affidavits. Workplace safety will necessarily suffer.

S.2153 also creates additional administrative procedures that must be followed by the Secretary in responding to worker complaints. The result would be a further diversion of OSHA resources away from actual inspections and enforcement as well as delay in the inspection process.

By creating additional standards and procedures with which the Secretary must comply in making inspections, S.2153 creates new defenses which an employer may raise in contesting a citation. For instance, employers would be able to challenge an otherwise valid citation on the grounds that the violation was found during an illegal inspection. Furthermore, S.2153 places the burden on the Secretary of proving that the employer is not exempt. Thus, S.2153 has the effect of shifting emphasis away from effective enforcement to legal challenges before the Occupational Safety and Health Review Commission and in the courts.

In conclusion, we would like to repeat our unequivocal opposition to S.2153. We have found nothing in the bill which promises the construction worker any more workplace safety than the present Act promises. In fact, for the reasons just explained, we believe that S.2153 would seriously undermine the advances in workplace safety that have been achieved during the 10 years of OSHA's existence. As we pointed out in our testimony before this committee on March 28, 1980, there are weaknesses with the enforcement of OSHA, but we feel that the present administration is making important steps toward curing these problems. S.2153 will do nothing to solve

these problems. In fact, it will make them worse. Under the present Act, OSHA has the authority to correct its deficiencies and we believe is working to do so. We trust that this committee will provide the necessary direction and support.

STATEMENT OF
WAYNE E. GLENN, PRESIDENT
UNITED PAPERWORKERS INTERNATIONAL UNION
TO THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
APRIL 25, 1980

The United Paperworkers International Union is completely and unalterably opposed to passage of S.2153, the mis-named "Occupational Safety and Health Improvements Act of 1980".

Passage of S.2153 could not realistically be expected to bring about any "occupational safety and health improvements" -- if by improvements we mean a reduction in job-related injuries and illnesses among American workers. We are convinced, in fact, quite to the contrary: S.2153, by eliminating most safety enforcement and seriously weakening much of what remains, can reasonably be predicted to lead to an increased incidence of occupational injuries and an overall deterioration of working conditions in America's workplaces.

We have heard repeated complaints from those favoring S.2153 that the annual injury statistics reported by the Bureau of Labor Statistics have not shown the reduction in occupational injuries that we might have hoped for. But S.2153 is exactly the wrong response to that disappointment.

We believe that the improvement in workplace safety has been greater than reflected by the BLS figures...for reasons we will point out shortly. But that aside, one conclusion that can be reliably drawn from the BLS statistics is that the need to which Congress responded in 1970 by passing the Occupational Safety and Health Act remains important today. To virtually end OSHA safety enforcement because it has not been as effective as had been hoped makes little sense. The obvious correct response to weakness is to strengthen.

It has been claimed that the function of the exemptions proposed in S.2153 is to "focus" OSHA's attention on the most hazardous employment. In actual fact, this bill does not focus or concentrate anything at all. It merely exempts...presumably on the assumption that OSHA inspectors, with a smaller number of eligible workplaces to choose from, will by default end up in those that did not qualify for an exemption.

This is not targeting, or focusing. It is merely a process of elimination which, while it is pretty sure to eliminate workplaces at the "safe" end of the occupational spectrum, quite clearly cannot be relied on to not exempt more dangerous work from OSHA coverage.

An excellent example is the experience of our members in the logging operations in the Maine woods. Logging is by far the most dangerous work done by UPIU members. According to BLS it is twice as dangerous as bituminous coal mining. If the whole logging industry could be considered as a single workplace of "1,000 and over" under the formula used in S.2153, it would have nearly 8 times too many lost-time injuries to qualify for an exemption.

An objective observor might see this as a perfect choice for targeting safety inspections under a reasonable plan for setting priorities. This is just what OSHA is now doing, in its efforts to add two safety inspectors with special expertise in logging safety to its new area office in Maine.

But this is not at all what will happen if S.2153 is enacted. Take for example two bargaining units of UPIU Local 1977, which represents these loggers. One, with an average workforce of 24, had no lost-time injuries in calendar 1978. They would have been exempt from OSHA safety inspections in 1979 under the first-cut exemption under subsection (b) of S.2153.

The second bargaining unit, with an average of 60 workers, reported only two lost-time injuries during 1978. They could have been exempted the following year by affidavit under subsection (c).

In 1979 the smaller unit had three lost-time injuries and the larger had eight! That means that both would have been covered for OSHA safety enforcement in 1980. But what will happen in 1981?

What we see happening, then, under S.2153 is not reasoned, systematic targeting of the most hazardous industries and workplaces. Instead, it will be exemption for most and a chaotic, arbitrary scheme which often fails to pick up even the most obviously hazardous employment.

It is worth mentioning at this point that S.2153 takes a remarkably liberal view of what constitutes an acceptably "safe" workplace...safe enough that in the sponsors' view there is no need to have OSHA enforcement, or the threat of OSHA enforcement, to persuade the employer to improve its safety record further. And that is exactly what exemption would mean: As a matter of national policy, Congress would be saying that the status quo... the present level of safety performance...in these plants is good enough--that no further improvement is needed!

It has been traditional in industry to look to the National Safety Council's "Million Safe Hours" awards as a benchmark, an achievement which indicates that an establishment has a good, sound, effective safety program. It is important to recognize that many of the so-called "safe" workplaces exempted under S.2153 will have injury rates several times higher. Some establishments with as many as twenty lost-time injuries per million hours worked would be exempted because of their "good safety records" under S.2153!

Many of our objections to various aspects of S.2153 can be most vividly illustrated by describing the experience of some of our local unions.

Local 675 represents 1100 workers at a pulp and paper mill complex in Virginia. They have a well-established, functioning labor-management safety committee. Much of what is accomplished cooperatively, is accomplished because of OSHA's existence. But from time-to-time this cooperation breaks down and the union is forced to file an OSHA complaint to get a dangerous condition abated.

Recently the local union safety director filed a complaint with Virginia OSHA about an unsafe method of lighting the lime kiln at the mill. It was clearly a hazard because it had just resulted in the third explosion in four years. It was obviously serious because it had burned a worker (including his eyes), knocked him "senseless", and broken two of his ribs.

If S.2153 were in effect now, it is highly unlikely that this local union would have been able to obtain the OSHA inspection they needed. In 1979 the company reported only 14 lost time injuries for a workforce of about 1700: Well within the definition of a "safe workplace" that would qualify for exemption under S.2153.

The local union representative stated on the written complaint that they had brought this danger to management's attention. The union was "calling in OSHA" now specifically because it had been unable to get any action from management. Yet, despite this, under S.2153 OSHA would have responded only by sending the employer a notice of the complaint. The almost certain result would be a reply from the employer either that there is no OSHA violation (as management sees it) or that the situation is well in-hand (from management's viewpoint). It is highly unlikely that an OSHA inspection would ever result from this obviously substantial employee complaint.

In this case (and in general) the first, and underlying, wrong assumption of S.2153 is that a number of lost-time injuries that falls below a pre-ordained benchmark is a reliable indicator that the workplace in question is somehow "safe"...that it can be exempted from safety inspections on the assumption that any inspection that did occur would not turn up much that is seriously wrong.

Our best evidence to the contrary is a set of citations resulting from a Virginia-OSHA safety inspection at this mill in August, 1979...the same year in which the lost-time injury record would have been "good" enough to earn an exemption under S.2153. Included in those citations were 103 "serious" safety violations and 34 "repeated" safety violations. What kind of logic is it that deems a workplace acceptably safe in the face of so much objective evidence?

The next mistaken assumption in S.2153 is that the lost-time injury reporting on which the whole exemption system (both from State Workers' Compensation data and through affidavits) is based, is believable. In simple fact, it is not! In addition to the 14 reported lost-time injuries in 1979, the local union has identified 22 other workers whose injuries kept them from doing their jobs, but who were brought into the mill on "light duty". These workers whose injuries resulted in "no lost time" include one who was scalded, two with broken ankles, three with chemical burns, and four with back injuries, to cite examples. In addition to those who were assigned "light duty" to escape reporting lost-time injuries, at least six injured workers who could not report to work collected sickness and accident insurance instead of workers' compensation. They, too, went unreported as lost-time injuries.

Local 675's experience in this regard should not be considered extraordinary--as much as one might wish it so. While we have no hard national figures, we do know that many employers use these ploys to avoid reporting lost-time injuries. Another example is UPIU Local 691, whose members manufacture floor tile in Pennsylvania. In 1979 the employer reported 17 lost-time injuries, in an establishment employing 700 workers: comfortably below the 20 injuries they would be allowed, and still be exempt from safety enforcement under S.2153. But, according to the chairman of the local union safety and health committee at least 30 on-th-job injuries resulted in workers being assigned "light duty"...which usually means little or no duty.

(When in preparation for this statement we contacted the local union safety committee chairman, he informed us that he himself had injured his back at work more than two weeks before, and was himself on light duty...meaning that he showed up, walked around, but did virtually no significant work.)

So far this year, Local 691 has had 5 lost-time accidents, and eight instances of "light duty". If this trend continues and S.2153 passes, they will be exempt next year despite their real safety experience.

The Virginia local, on the other hand, has had an increase in injuries, with 8 reported lost-time (162 total) injuries in the first quarter of 1980. If their trend continues, they will definitely have OSHA safety coverage next year: Thus becoming another example of the on-again, off-again arbitrariness of S.2153's "targeting" mechanism.

Another wrong assumption of S.2153 is that employees' right to request -- and get -- an OSHA safety inspection is somehow squandered or misused, and does not uncover significant safety hazards (at least in plants with "good safety records"). Two good illustrations of the falseness of this assumption have already been cited in the experience of our Virginia local: the explosion hazard which was the subject of their recent OSHA complaint; and the August, 1979 inspection that uncovered 103 serious hazards... which also resulted from a complaint filed by the local union safety committee.

In the last decade our local unions have made tremendous progress in developing effective mechanisms for addressing workplace safety through collective bargaining: with improved contract language and stronger, more active union-management safety committees. But the foundation upon which every one rests is OSHA: the law, the standards, but especially the right to "call in OSHA" when needed.

These safety committees' influence with management -- their ability to get hazards corrected -- rests very heavily on the threat of an OSHA inspection .... that if an OSHA safety inspector does come in, the employer will be fined and given a fixed time by which to abate the hazard, and that the inspector may very likely find--and cite--more hazards than the one(s) the local union is specifically complaining about. If that threat is removed, so will be much of the safety committee's effectiveness.

UPIU Local 1712 in New Jersey did not waste their right to request an inspection. Last June, they gave up trying to get management to agree to stop using an overhead crane to lift more than it was designed for. They complained to OSHA. A compliance officer inspected, and the employer was cited for a serious safety violation.

All the while, management contended there was no hazard, and no violation. Had S.2153 been in effect, and had the company had sufficiently few lost-time injuries, the OSHA inspection most probably would never have occurred. Luckily for the local union (but very unluckily for 47 of its 800 members) this company had a poor safety record. They could have gotten the inspection in spite of S.2153.

In conclusion, we find S.2153 to be a very dangerous and ill-conceived proposal. It will exempt most workplaces from safety enforcement. But it will not target or focus the remaining safety enforcement efforts in any kind of coherent, logical pattern. Quite the opposite: Almost all workplaces will be exempt at least some of the time. Statistical variations and differences in injury reporting practices will play very significant roles in determining who is covered or not covered, while objective evidence of the existence of workplace hazards will play no part at all in these determinations.

Well-established mechanisms for labor-management cooperation on safety matters will be left in a shambles. In almost all establishments the incentive for employers to heed workers' recommendations will be gone. Employers will not face the threat of an OSHA inspection. They will have nothing to gain by improving safety conditions further, because there are no negative consequences associated with the status quo.

There are several other unreasonable and unacceptable features of S.2153, such as the schemes for eliminating penalties in "safe" workplaces and reducing penalties even for those employers with such horrendous safety records that they cannot qualify for exemption; and the limitations on the scope of inspections triggered by catastrophes and employee complaints (on those very rare occasions when a complaint inspection occurs).

We will not go into each specific problem here because the major weaknesses in S.2153 are so basic, so important that the bill as a whole is irreparable. No amount of tinkering can make it acceptable.

We, therefore, urge the Committee to reject S.2153 itself; and to reject it and the concepts it embodies as a basis for legislative action.

TESTIMONY OF
BORIS H. BLOCK, GENERAL SECRETARY-TREASURER
UNITED ELECTRICAL, RADIO & MACHINE WORKERS
OF AMERICA (UE)

on S.2153

The Occupational Safety and Health
Improvements Act of 1980
before the
Committee on Labor and Human Resources
of the
United States Senate

April 15 - 17th, 1980

My name is Boris H. Block. I am the General Secretary-Treasurer of the United Electrical, Radio & Machine Workers of America (UE). Our union represents 165,000 workers in the electrical manufacturing and machine tool manufacturing industries who work for such companies as General Electric, Westinghouse, GTE, TRW, Bendix, Textron, Rockwell International and Allen-Bradley.

We welcome this opportunity to present our views on S.2153, the Occupational Safety and Health Improvements Act of 1980, before the committee on Labor and Human Resources.

This bill is a purported amendment to the Occupational Safety and Health Act of 1970. It is in fact, under the guise of an amendment, a comprehensive rewrite of the OSH Act - in the same spirit that the Taft-Hartley Act represented a repeal of much of the National Labor Relations Act while ostensibly being an amendment.

To put it plainly, this bill is an attack on working people. We are angered not only by the specific provisions in the bill itself, but also by its political presumption that a toothless OSHA would best serve the public welfare. We are also troubled by support for this bill by some on this committee who have in the past shown concern for laboring American men and women.

Mr. Schweiker, in introducing the bill, has stated: "The bottom line is this: After 9 years under the Act's present safety regulatory scheme, we are left with no demonstrable record that it works and with a bad taste all around from the experience" (Congressional Record, S19249). Mr. Chairman, we, along with organized labor in general are only too well aware of the weaknesses and limitations of the present OSH Act. We are at a loss however to understand how gravely restricting OSHA's limited rights tc inspect the workplace and offering nothing in its stead can hope to improve the dreadful conditions that worker face daily.

At a time when workers need more and better protection of their health and safety on the job, S.2153 would exempt 94 percent of all U.S. businesses and industries from OSHA safety inspections based on the companies' fatality and lost-time injury records as determined from worker's compensation reports and annual, unverified OSHA reports. Besides eliminating the vast majority of all OSHA inspections under the guise of eliminating safety inspection (the term safety inspection is not defined in the OSH Act or in S.2153), S.2153 would eliminate or lower fines for observed OSHA violations if firms establish advisory labor-management safety committees and health and safety consultation programs.

When one considers that between 1973 and 1978 the average OSHA fine for a violation of safety and health standards was not quite $60; and considering that a company like GE has an average weekly revenue of $432,000,000, it is readily apparent that it is cheaper to risk fines than to correct the hazard. Fines, rather than being eliminated or reduced, should be increased dramatically and criminal jail terms for employers who deliberately violate the law must be imposed more frequently.

For exempted plants, S.2153 allows OSHA inspection only after a death or serious injury. This is a macabre form of protection. It reduces the OSHA inspectorate to the functions of a coroner's office, determining the cause of death and injury after the fact rather than preventing the accident in the first place. OSHA was correctly enacted originally as a preventive health measure. S.2153 would virtually eliminate this role for OSHA in the vast majority of plants and businesses in the U.S.

S.2153 effectively removes one of workers' greatest powers under OSHA, the threat to call in an OSHA inspector if management does not improve health and safety conditions in the plant. Often the threat of an OSHA inspection gets results from a recalcitrant management before an inspector has to be called in.

because management knows that the OSHA agency properly gives high priority to worker complaints of hazards. Under S.2153 all such complaints will first be funnelled back to management by OSHA. Then, solely on the basis of employer "assurances," these inspections, which are now routinely conducted, will be eliminated. At best this is a license for management to procrastinate. At worst it is a license for management to ignore hazards and instead conduct a search for the complaining employee, using intelligence gathered from the letter of complaint itself.

S.2153 relies for its determination of a safe, (and hence exempted) plant on notoriously unreliable state worker compensation records and unverified reports from annual employer OSHA logs. It does this despite the widespread pratice - well known to workers - of bringing injured employees into the plant on some artificial "light duty" in order to avoid reporting a lost time injury. And when such a lost time report is unavoidable, employers commonly entice and pressure the injured employees to file claims under company health and insurance plans rather than workers compensation. Management assures the employees that they will get the insurance payments right away, rather than having to wait for delayed payments under "comp." Union representatives constantly have to explain to members the better long-term protection workers compensation gives and do battle with management to put plant injuries under workers compensation. In many unorganized shops - and this we know from talking to workers who are trying to organize - workers compensation benefits are almost never claimed. Thereby, under S.2153, many non-union employers will gain illegitimate exemption from OSHA inspection -- as well as avoid higher workers compensation premiums. Furthermore, workers in states where compensation and state OSHA records are poorly designed and haphazardly gathered will further lose access to inspections.

S.2153 maliciously stipulates that "where distinctly separate activities are performed at a single location, each activity shall be treated as a separate workplace." This creates by design an administrative nightmare in which workers will constantly be uncertain as to whether their particular job category or plant location is eligible for inspection. Management and union officials will be constantly engaged in battles about inspection eligibility, and OSHA inspectors will be waiting around outside the plant not inspecting anything until these arguments are resolved. This provision alone merits this Committee's decisive rejection of S.2153. It better than any other single provision reveals the author's true intentions - not to "improve" OSHA, but to destroy it by destroying its effective administration.

Furthermore when finally getting into a previously exempted plant the OSHA inspector's scope is "limited to the purpose of such inspection or investigation." Thus OSHA's current practice of conducting a wall-to-wall inspection of plants is eliminated. The OSHA inspector would have to walk with blinders through a plant to the site of a complaint, bitting his or her tongue upon seeing a potentially serious violation. Later, after disaster strikes, the inspector may say - "Yes, I saw the potential danger but I couldn't check it out or abate it because I was prohibited from inspecting in that location." This is what maimed workers or their surviving family members may have to listen to after an accident.

Finally S.2153 supports as a matter of policy establishment of joint labor-management safety committees (explicitly in the bill however with advisory powers only). We take great exception to this provision which would inject OSHA into an area they have no right to be.

Our International Union opposes as a matter of policy establishment of joint labor-management safety and health committees. This position was supported unanimously at our last International Convention in New York City in 1979, as it has been by earlier conventions for many years. I would like to explain the basis for our determined opposition to this particular provision.

We recognize that employers are in business to make profits. The substances they use in the manufacturing process, the lay-out of the plant, the machinery and equipment they install, are primarily designed to aid them in that endeavor. Therefore, when workers propose the substitution of a substance with a less toxic one, or redesigning of the plant lay-out to reduce the spread of fumes or dusts or the addition of safety guarding devices for machinery or equipment - the employer's response invariably will be framed in the context of how much the proposal will cost. In other words if it cuts the company's profits, you are in for a fight. In our view the struggle for cleaning up the shop is no different than the struggle for improved wages and conditions.

Faced with union militancy in cleaning up the shop, employers contend that, unlike wages and fringe benefits, the area of safety and health represents a problem separate and apart from traditional union-management areas of conflict. They promote themselves as being genuinely concerned with protecting workers' health and safety and call for a cooperative effort in dealing with these problems - a joint labor management safety and health committee.

We refuse to be hoodwinked by this approach. Management's chief desire is the making of profit. And, since it is cheaper to let easily replaceable workers be exposed to toxic substances and subjected to dangerous and unhealthy processes than it is to "re-engineer" the workplace - management's "cooperative" approach to safety and health is clearly directed at lessening union militancy in cleaning up the shop.

In our view joint union-management safety committees provide the employer with an effective means for working out on those union people whose responsibility it is to oppose management's resistance to safety and health improvements. These committees also bolster the lie that management is genuinely concerned with enhancing the workers' safety and health. Obviously, when workers are taken in by this lie, it seriously interferes with their ability to focus on the cause of unsafe and unhealthy work conditions -- the desire of management for greater profit.

Our union argues for Union safety and health committees - committees whose sole interest is to improve the shop envirornment and who are accountable only to the workers. Any employer genuinely concerned with safety and health, is perfectly capable of cooperating with a union committee.

We,therefore, unalterably oppose this Committee's striking out in yet another misguided policy direction in this bill. We strongly suggest that you reject S.2153 and its anti-labor policies in toto.

Our members, along with members of other unions are greatly disturbed by this bill. The Vice-Chairman of this committee should be aware of the intensity of opposition to this bill by UE and other union members in his home state. Should this committee conduct hearings in cities around the country, as has been suggested, others will find this to be the case if they have not so found already.

We believe that the best course of action for this committee is to reject bill S.2153 in its entirety and get back to effectively enforcing the present OSH Act and addressing the whole host of other critical issues now affecting US working people - unrestrained inflation, continuing high levels of unemployment, the flight of U.S. industry abroad and continuing racial and sexual discrimination on the job.

oOo

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STATEMENT BY
THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES
BEFORE
THE SUBCOMMITTEE ON CHILD AND HUMAN DEVELOPMENT
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
ON
S. 2153
TO AMEND THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

APRIL, 1980

Mr. Chairman: The National Federation of Federal Employees appreciates the opportunity to testify on S. 2153. NFFE represents approximately 150,000 civil servants, all of whom have a vital stake in an effective safety and health program, both inside and outside of the Federal sector.

The subject of the Subcommittee's hearings, S. 2153, would amend the Occupational Safety and Health Act of 1970 in such ways as to weaken its protections for employees in private industry. NFFE does not represent workers who would be directly affected by the bill's passage. But we nonetheless strongly oppose it since the legislation would erode the long-standing rights of our brothers and sisters outside the Federal workforce and, equally important, diminish the chances that civil servants would ever enjoy a safe work environment.

Safety and health protections in the Federal workplace have been a continuing source of frustration for NFFE. For years, we have attemped to rid Government worksites of hazardous conditions. And with the advent of the 1970 Occupational Safety and Health Act, NFFE felt that, at last, our efforts would be rewarded.

Such hopes were soon dashed, however, when it became clear that Federal employees were not to enjoy the same protections under the Act that were granted workers in private industry. Although agencies were required to develop standards consistent with OSHA standards, there would be no enforcement provisions.

NFFE strongly believes that these two sets of parallel standards, with only one being actually enforceable, create unnecessary danger, not to mention unnecessary work, for Federal employees. The following data attests to this fact.

I will submit for the record statistics compiled during calendar years 1973 and 1977 by the Department of Labor. They clearly illustrate that Federal worksites are becoming increasingly hazardous. The data show the number of work-related deaths and injuries to Federal employees during the periods:

	1973	1977
Deaths - - - - - - - - - - - - - -	119	131
Injuries and illnesses - - - - -	111,044	182,790

The size of the Federal workforce has remained constant since 1973, yet the number of work-related fatalities, injuries, and illnesses has increased significantly. It is difficult to compare these figures with those in private industry, since the duties of civil servants cover almost the entire occupational spectrum. Nevertheless, the data cannot be dismissed lightly.

Indeed, the statistics are a strong indictment of the "separate but unequal" systems established by the 1970 Act, and they are the impetus behind H.R. 5642, by Mr. Clay, fully extending OSHA protection to the Federal sector. Although the bill would place enforcement responsibility with the Office of Personnel Management rather than the Labor Department, it still represents the only legitimate approach to improving health and safety protections for Government workers and, consequently, reducing the rate of disabling injuries and related compensation claims.

H.R. 5642 would implement a sound safety and health program for Federal workers, something desperately needed for many years. Yet, before the bill has even begun its journey through the legislative process, it could be emasculated by S. 2153.

As long as Congress continues to recognize the rights of employees in private industry to a safe working environment, Federal workers eventually will enjoy the same protections. But once it retreats from this policy, which passage of S. 2153 certainly would reflect, there would be little chance that the Federal workplace would ever achieve a necessary level of safety.

Hence, NFFE strongly opposes the bill. We hope the Subcommittee will reassert its commitment to the rights of American workers by taking no further action on it.

That concludes my statement. Again, thank you for the opportunity to present NFFE's views.

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Allied Workers

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STATEMENT FROM

ROOFING AND WATERPROOFING INDUSTRY

TO

THE SENATE COMMITTEE

ON LABOR AND HUMAN RESOURCES

The Roofing and Waterproofing Industry, one of the oldest crafts, applies roofs to every type of building in this country. These buildings can be from one to many stories and are of various shapes. Similarly, waterproofing is applied to a wide variety of structures. The United Union of Roofers, Waterproofers and Allied Workers represents a good many of these workers and is very much concerned about their safety and health.

Roofs are constructed of a variety of materials - tile, slate, asphalt shingles, various types of cold sprays, plastics, urethane foams, tar and felt. The most commonly applied is the composition roof, built on the job site with alternating layers of very hot (400° to $500^{\circ}F$) bitumen and felt. This hot material, either coal tar pitch or asphalt, can cause burn injuries in addition to its' deleterious effects on health. The newer types of roofs, involving synthetic materials have very separate safety and health problems. For example, the plastic systems use large amounts of solvents which can cause worker intoxication. Urethane foams have been linked to respiratory problems.

In addition to this, the work site has inherent dangers. Roofers must work at great heights on a variety of sloping surfaces with little or no protection from falls. They regularly traverse ladders, handle hot materials and perform heavy manual labor associated with transporting roofing materials and operating production equipment. Roofers must work in a variety of weather conditions, ranging from high winds to the extremes of cold and summer heat.

These problems are compounded by the sheer nature of this industry. Most work environments remain the same. A mine or factory are there day after day. Sometimes roofs are completely built in a single day with the crew moving to a new site the next day. Roofing is a small business. Most of the 12,000 contractors have seven or fewer employees. Only 60 of the contractors have 100 or more employees. Therefore, evaluating conditions, inspections and abatement are extremely difficult.

Waterproofing has many of the same problems. The types of materials used are quite similar. Work areas are many times in confined spaces, such as trenches around building sub-structures. Besides the danger of cave-ins, these cramped working conditions help to elevate both exposure to fumes and contribute to accidents, for example burns.

Because of the high accident rate, one of the highest of any industry, the Department of Labor deemed the roofing/waterproofing industry as one of the ten Target Industries. Attempts to make the industry safer was almost futile until the Occupational Safety and Health Act of 1970 was passed.

With the assistance of OSHA, we have developed a program under a New Directions Grant to prepare to educate roofers and waterproofers in accident recognition and means to prevent them. Safety and health rules are being developed to provide a safe and healthy worksite for the roofer/waterproofer. Another component is educating workers as to their rights and how to effectively use another means of protection, OSHA.

Review of our industry shows health problems (as the result of exposure to materials we work with) could be just as serious as accidents. Our grant has provided us with an Industrial Hygienist to evaluate these materials and advise workers about them. This program has allowed us to develop relationships, for mutual benefits, with academic institutions to explore the safety and health problems of the roofing/waterproofing industry.

In short, the New Directions Program has been a major shot in the arm for the health and welfare of workers engaged in this industry. With the education we are attempting to provide our members, they will become proficient in hazard recognition, avoiding many possible accidents. But if the condition cannot be remedied, they will also know how to use one of the most important tools in safety and health, OSHA.

While there are many OSHA standards which are broadly applicable to the roofing industry, notably the construction standards (CFR 1926), some hazardous conditions found in roofing are not addressed, for example, the lack of perimeter guarding on the roof level. OSHA has recognized this and has put a diligent effort in correcting this by devising a standard. Despite certain sectors' active resistence to this, OSHA has prevailed. The final standard should do much to alleviate some of the fatalities our members meet with every year.

Statement of the National Roofing Contractors Association in Support of S.2153, The Occupational Safety and Health Improvements Act.

The National Roofing Contractors Association represents over 1700 roofing contracting firms in all 50 states. Our members employ approximately 75,000 tradesmen and account for about 60% of the roofing work performed in the United States.

We are pleased to offer this statement in support of S.2153, The Occupational Safety and Health Improvements Act. This bill seeks to address what we perceive to be a serious problem: OSHA's lack of cost-effectiveness and tendency towards harassment.

The roofing industry was selected by OSHA, back in 1971, as one of its five "target" industries; consequently, we feel especially well qualified to comment on their enforcement procedures and practices.

And in general, our observations can be summarized as follows: A great deal of time, effort and money has been expended both by OSHA and by our industry on matters that have had very little to do with reducing accidents or improving safety.

Everyone has OSHA "horror stories" to cite; abuses occur within every government agency. Still, since this bill addresses such things, we feel it's worthwhile to cite just a few examples of what our members have been facing:

1. One member had to go to elaborate measures to prevent OSHA from taking him to court for his contesting a citation alleging that a sheet metal shear was not guarded. The guard was there all along - but the inspector didn't recognize it.

2. Another member was cited for failure to guard the "non-current carrying metal parts" of a (leased) soft drink machine.

3. Still another member was cited for "allowing ice to come in direct contact with water," and another for permitting men to wear "absorptive" gloves, whatever that means.

In some ways, these examples, and others like them, are amusing, but we can assure the committee that others are not. One member of ours, after being inspected and cited, wrote a letter of complaint to his Congressman. In the next six month period, he was inspected three more times by OSHA, visited twice by the IRS and once by HEW. Is it any wonder that the small businessman feels frustrated in attempting to cope with the government?

Still, we recognize that the real issue is whether this bill would make OSHA better, and make industry safety practices better. We believe it would do both.

In the roofing industry, the majority of injuries are classified as either 1) burns or 2) strains, sprains and hernias. Yet an examination of OSHA's activity with regard to our industry shows a preponderance of citations dealing with unguarded perimeters of flat roofs. Falls from roof edges are relatively rare, yet OSHA interpreted a standard written for "floors" as applying to roofs, and it has taken our members several years and countless thousands of dollars to prove that there is a difference between a roof and a floor.

We are convinced that if OSHA spent its time where it's needed - with those firms having poor safety records - that it would spend less time enforcing irrelevant or vague standards, and more time correcting obvious shortcomings.

We are also convinced that our members, by virtue of OSHA's notoriety, would be motivated to take steps to avoid routine citations. We're not happy to support a measure that recognizes fear of the government's punitive powers as a motivator, but we recognize the practicalities of the situation, and suspect the net result will be a better OSHA and a safer industry -goals with which we can all agree.

NATIONAL CATTLEMEN'S ASSOCIATION
P.O. Box 569 • 1001 Lincoln Street • Denver, Colorado 80201 • 303-861-1904

April 10, 1980

Hon. Harrison A. Williams, Jr., Chairman
Committee on Labor and Human Resources
United States Senate
4230 Senate Office Building
Washington, D.C. 20510

Dear Senator Williams:

Enclosed you will find three copies of a statement representing the views and comments of the National Cattlemen's Association with respect to pending bills to amend the Occupational Safety and Health Act.

The position of the NCA is expressed in connection with S. 1486, S. 1572 and S. 2153 on which you are holding hearings April 15, 16 and 17. Since it will not be possible for anyone to appear in person for the NCA, we are submitting our statement and ask that it be included in the printed record.

We hope that you and all members of the Committee can give favorable consideration to our views and comments as well as the recommendations for an amendment to the existing statute.

Respectfully yours,

W. H. Webster

W. H. Webster
Chairman, NCA Labor Committee

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Serving The Nation's Beef Cattle Industry

NATIONAL CATTLEMEN'S ASSOCIATION
P.O. Box 569 1001 Lincoln St.
Denver, Colorado 80201

STATEMENT

of the

NATIONAL CATTLEMEN'S ASSOCIATION

to the

COMMITTEE ON LABOR AND HUMAN RESOURCES

United States Senate

Relative to

Amendments to the Occupational Safety and Health Act
of 1970

S. 1486, S. 1572, S. 2153

Submitted By

W. H. Webster
Chairman of the Committee on Labor
National Cattlemen's Association

April 15, 1980

The National Cattlemen's Association is the national spokesman for all segments of the nation's beef cattle industry--including cattle breeders, producers, and feeders. The NCA represents approximately 280,000 professional cattlemen throughout the country. Membership includes individual members as well as 51 affiliated state cattle associations and 15 affiliated national breed organizations.

STATEMENT

By the National Cattlemen's Association

relative to

Proposed Amendments to the

Occupational Safety and Health Act of 1970

* * * * * * *

From the time it was enacted in 1970, the members of the National Cattlemen's Association have had serious reservations about, and strong objections to, the Occupational Safety and Health Act, particularly as it pertains to farmers and ranchers. It was apparent that the Act was a gross invasion of privacy, an encroachment on individual freedoms, and we questioned its application and administration would produce any particular benefits.

After nine years of existence, there remains no convincing evidence the statute has improved the safety and health of employees. Moreover, the program has cost billions of dollars in administration plus untold billions required to be spent by businesses to comply. As a result, the Act has created an unrivaled degree of antagonism among employers.

The issue at the moment, which this statement addresses, involves amendments to the Act which would permanently exempt certain farmers and ranchers from the provisions of OSHA. Before going any further we assure the Committee that farmers and ranchers are profoundly interested in and concerned about the safety and health of their employees. This is not only a moral consideration, but is also an economic one. In particular, the smaller employers cannot afford to contend with lost time, injuries, or unhealthy circumstances.

However, in the best judgment of this Association, the approach made by OSHA is unworkable and inappropriate. Therefore, the members of the NCA strongly support legislation that will exempt farm and ranch employers from OSHA, and we are prepared to substantiate that position. In the opinion of our members, a program of education and training offers a far more practical approach toward improving and protecting the safety and health of agricultural employees.

Two of the bills being considered at these hearings--S. 1486 and S. 1572--would amend the Act so the statute would not apply to any person who is engaged in a farming operation except that the excused persons would be those who employ 10 or fewer employees. Since those agricultural operators with 10 or fewer employees represent a high percentage of agricultural employers, the NCA can and does support the concept of such an amendment. If an amendment is reported out and acted upon, we would much prefer the exemption for persons engaged in farm operations as it is stated in S. 1486.

However, when considering such an amendment, we would urge that the Congress would, in its wisdom, decide to exempt all agricultural employers from the provisions of OSHA for the reasons stated hereafter.

At the same time, we do recognize that the Committee is also considering S. 2153 by Senator Schweiker and others. With little question, this bill would redirect the agency's priorities and be definite progress toward restructuring OSHA. However, it would not, in itself, fully correct the situation for farmers and ranchers if the Act is applied to them.

There is ample precedence for the exemptions the Committee is considering; namely, those contained in S. 1486 and S. 1572. The Congress has concurred in this action for a number of years through annual expenditure restraints in appropriation bills. In these several years, including the current fiscal year, the annual appropriation bill for the Department of Labor, Department of Health, Education and Welfare, and related agencies, has disallowed the expenditure of appropriated funds for enforcing the Occupational Safety and Health Act where it might be applicable to any person engaged in a farming operation, provided that person employed 10 or fewer employees and did not maintain a temporary labor camp.

Since this has been the sense of the Congress on a number of occasions in the past, it would seem there is every justification for amending the statute and making this exemption permanent thus avoiding the exercise of an annual inclusion in the appropriation bill. Such an amendment would merely continue the action that has previously been taken by the Congress.

From the beginning, the NCA has maintained the provisions of OSHA were not tailored for farmers and ranchers. Under the Act, farmers are required to abide by only six specific OSHA standards. These six farming standards are:

(1) establish health and sanitation rules for temporary labor camps housing migrant workers;

(2) require the use of slow-moving vehicle emblems where applicable to farm machinery being driven on the highway;

(3) establish regulations governing pulpwood logging operations;

(4) set up requirements for the storage and handling of anhydrous ammonia which is used as fertilizer;

(5) require machine guards to protect employees from coming into contact with various moving machinery parts; and

(6) mandate rollover protective bars for tractors.

This means that any additional application of the Act to farmers would have to be made under the vague and ambiguous General Duty Clause which would put farmers and ranchers in the untenable and frustrated position of not knowing what standards of conduct might be expected. The General Duty Clause provides "each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees".

For this and other reasons, we contend the Act was tailored and designed to fit other industries and businesses in general and is not adaptable to or appropriate for agricultural operators,

best copy available

farmers and ranchers. The vagueness and ambiguity of the application of the Act to agriculture as previously mentioned could seriously disrupt livestock operations as well as other agricultural operations. The structure, methods and extent of farming, feeding and ranching are unique and can, in no way, be dealt with in the same manner as a manufacturing plant, a warehouse, a place of business and the like.

Further supporting justification for the exemption of farmers and ranchers from OSHA are the highly questionable features of the Act itself.

Despite any conclusions to the contrary, there remain ample reasons to question the constitutionality of the Act. The all-powerful authority vested in the Secretary of Labor to act as legislator, policeman, judge and jury, along with the almost complete lack of due process accorded employers, raises serious questions as to the constitutionality of the Occupational Safety and Health Act. Specific sections delegate to the Secretary of Labor certain legislative, police and judicial powers with respect to enforcement and standards of conduct. Rights of appeal are limited for employers, and there are certain denials with respect to public trials as well as the right to confront and cross-examine accusors.

Further support for the argument on constitutionality is the action by the Supreme Court. A section of OSHA provided for unlimited search and investigation of the premises and facilities of employers, treating said property as if it were publicly owned and controlled.

The Supreme Court has now ruled that OSHA does not have the authority to conduct warrantless searches. The Court applied the Fourth Amendment of the Constitution, which protects the rights of people in their houses, against warrantless searches and spells out that no warrants shall be issued, but upon probable cause. The Court ruled that the businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.

Moreover, the Act is highly discriminatory. It places all responsibility for employee safety and health solely on the employer, including accidents and the like resulting from careless, negligent, or malicious acts of employees. The Act encourages the employees to report alleged violations and then shields the employee even though his charges may be unwarranted or without foundation at all.

Perhaps the most telling and convincing argument against the retention of OSHA, in any form, is the miserable record of performance by the Department of Labor under the law. After nine years of active existence, in the words of one of the original strong supporters of the law, there is no demonstrable evidence the law has improved workers' safety. Not only is there no clear-cut evidence of benefit to employees, there are reliable statistics to show the program has been an utter failure.

While the Department of Labor and labor organizations maintain these statistics show that OSHA has prevented thousands of deaths and injuries since its origin, realistic opponents have shown the Act to be an absolute failure using the same government statistics. A study by the United States Chamber of Commerce reveals that, since 1971, the number of serious injuries in America's workplace is up by 25 percent. And the severity of those injuries, measured by total lost workdays, is up by more than 34 percent. Worst of all, the Chamber report continues, OSHA has had almost no positive impact on the number of workplace fatalities.

This inferior record of OSHA since 1971 follows an eight-year period prior to 1971 when industry was not subject to the unrealistic standards of OSHA and the arbitrary attitudes of compliance officers, during which period the National Safety Council reports there was actually a steady decline in the rates of both serious injury and fatality. In fact, according to the National Safety Council, industry had shown consistent improvement in the prevention of serious injury and fatality since the mid-1940's.

Most of the statistics used undoubtedly came more prominently from the records of business and industry, other than agriculture. Since the program has been a dismal failure for the types of employers and businesses for which it was designed, it seems even more reasonable and justified to excuse from the provisions of OSHA the entire agricultural industry for which the Act was not designed, and does not fit.

In this connection, we raise a very critical question. Since the Act was implemented in 1971 billions of taxpayers' dollars have been spent in the administration of OSHA, and the expenditure of untold billions of dollars have been forced upon businesses and industry in order to meet the requirements of the Act, its rules and regulations. How can anyone conscientiously defend the continuance of such a statute considering that its existence has cost multi-billions of dollars without any clear-cut and conclusive evidence of benefit to anyone.

The argument becomes even more compelling, at this point in time, when it is imperative that the Federal Government throw out costly and wasteful programs, reduce Federal expenditures, ease the burdens on business and industry, foster reductions in unemployment, and contribute to an industrial climate that will improve productivity.

In conclusion, we urge the Congress to at least amend the Occupational Safety and Health Act so it does not apply to farmers and ranchers. We believe the circumstances fully justify this action and we trust the Committee and the Congress will concur with such an exemption.

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STATEMENT OF THE AMERICAN FARM BUREAU FEDERATION TO THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES WITH REGARD TO S. 2153, A BILL TO AMEND THE OCCUPATIONAL SAFETY AND HEALTH ACT

April 29, 1980

The American Farm Bureau Federation is a general farm organization with a membership in forty-nine states and Puerto Rico. There are more "places of employment" in agriculture than in any other business sector in the United States.

We are disappointed that this Committee was unable to find time for Farm Bureau to testify in person. We encourage the Committee to consider major modifications to OSHA. Adequate testimony has already been presented to establish that, beyond any doubt, OSHA has not succeeded in its stated mission of causing work places to be free of safety and health hazards. Because of the uniqueness, complexities and diversities of the farming industry, efforts to regulate safety in agriculture are doomed to continued failure. We believe that only programs of education have any potential for success in reducing safety and health-related injuries on the farm. A few examples will illustrate this point.

Technology in agriculture has changed considerably in the last few years, leading to new safety hazards. We have found that the handling of the new large hay bales has led to hazards involving equipment turnover and the potential danger of being crushed beneath the bales. The handling of long sections of lightweight irrigation piping beneath power lines has led to instances of electrocution. Farm ponds continue to be a source of drownings. Increasing reliance on wood for home heating has increased the incidence of burns and fires. Field fires from mixtures of dust and leaking hydraulic fluid on combines have led to injuries and fatalities. Unusual weather conditions during the growing season have occasionally led to an accumulation of toxic levels of silage gas in silos. In some parts of the country, tornadoes have been a major cause of injuries and fatalities on the farm.

As State Farm Bureaus have identified problems, they have instituted safety education programs to deal with each specific cause. In New York, for example, training programs have been established for local rescue squads to perfect extrication procedures as a means of minimizing human loss of limb and life during rescue operations following farm accidents. Participation in these training programs has involved up to 114 rescue squad members from one county.

The California Farm Bureau has conducted training programs on the handling of pesticide-contaminated clothing to assure both safety in handling of the clothing, adequate cleaning of the clothing, and proper disposal of the water used in cleaning. This program includes information on proper chemical storage to protect the farmer, the farm worker, and others who may inadvertently be in the area.

The Missouri Farm Bureau is participating in a major safety training program working with FFA, 4-H, and Young Farmer groups to provide schoolroom instruction on safe equipment operation and related farm safety matters.

In Mississippi the Farm Bureau has conducted a membership accident and fatality survey to guide the direction of their safety education programs. This survey has enabled them to identify the cause of accidents so that priorities may be established in safety education. Drownings, fire, and machinery safety have been identified as their order of priorities. They have all 82 counties in the state participating in their survey and education program. Following their safety education program, they conducted--on request--farm safety inspections to assist the farmer in identifying potential hazards.

These are but a few examples of the efforts by a responsible industry attempting to respond directly at the local level to the needs of both farm families and the farmer's employees.

Currently there are six specific regulations of OSHA directly applicable to agriculture. These include standards for: (1) temporary labor camps, (2) storage and handling of anhydrous ammonia, (3) slow-moving vehicles, (4) pulpwood logging, (5) rollover protection on tractors, and (6) machinery guarding.

We believe that no regulatory program will be able to address the diversity and changing nature of the safety problems associated with production agriculture. It is for this reason that we support modification of OSHA to provide for educational options to present regulatory efforts.

We appreciate this statement being made a part of the hearing record.

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STATEMENT
OF THE
NATIONAL ASSOCIATION OF FARMWORKER ORGANIZATIONS
CONCERNING A BILL TO AMEND THE
OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970
BEFORE THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
April 16, 1980

Susan Fernandez
NAFO

"A National Community of Farmworkers and Their Organizations"

National Association of Farmworker Organizations
1332 New York Avenue, N.W., Washington, D.C. 20005
(202) 347-2407

Statement of the National Association of Farmworker Organizations Concerning a Bill to Amend the Occupational Safety and Health Act of 1970 before the Senate Committee on Labor and Human Resources

This statement is submitted for the written record on behalf of the National Association of Farmworker Organizations (NAFO). NAFO is a non-profit, national coalition of farmworker-governed, community-based organizations committed to protecting the rights of migrant and seasonal farmworkers. Migrant and seasonal farmworkers number approximately 5.8 million and through their contact with NAFO's member organizations we know that occupational hazards represent one of the most serious threats facing farmworkers and their families. Further, farmworkers have historically been the greatest victims of this country's agricultural system.

The Occupational Safety and Health Act (OSHA), enacted in 1970, was the first major federal legislation that included farmworkers on an equal basis with other workers. The purpose of the legislation was to protect every worker, or rather

> to assure so far as possible every
> working man and woman in the nation
> safe and healthful working conditions
> and to preserve our human resources.

(Occupational Safety and Health Act of 1970, §651 et seq.) In passing this legislation, Congress mandated the safety of workers and the prevention of unnecessary job related deaths and disabilities.

S. 2153, the bill presently before this committee for

"A National Community of Farmworkers and Their Organizations" consideration, seriously threatens the purpose of OSHA and thus, farmworkers as a group. In its present form, the bill would allow all businesses with "good safety records" to exempt themselves from OSHA safety inspections including:

-routine safety inspections, and

-inspections triggered by employee complaints where the complaint can be resolved without an inspection.

In order to qualify for these exemptions the criteria a business must meet to be held to have a "good safety record" include:

-no injuries reported (automatic exemption),

-no employee deaths by occupational injury, and/or

-very few occupational injuries that resulted in few lost workdays (according to a table set up in the bill).

The bill suggests that in order to determine whether a business may be exempt, OSHA obtain the above data from state workman's compensation records.

Further, S. 2153 seeks to put employers' cost-savings ahead of worker safety. The penalties for violations have been greatly reduced for businesses that, in fact, violate safety standards. And penalties are non-existent for businesses that have advisory safety committees and consultation programs.

It is NAFO's belief that this bill would be particularly devastating to farmworkers primarily because workman's compensation data will be the determining factor for exemptions and only fourteen states provide workman's compensation to this group (Seventeen states do not prescribe any coverage for farmworkers and twenty-one states have limitations in their plans for agricultural employees). (U.S. Department of Labor, Employment Standards Administration, Division of State Workers' Compensation Standards, 1/79). The following is a chart indicating the number of agricultural workers in those states which outright fail to provide workman's compensation to agricultural workers:

STATES WHICH DO NOT ENSURE ANY COVERAGE FOR FARMWORKERS

State	Number of Migrant and Seasonal Farmworkers*
Alabama	23,730
Arkansas	13,469
Georgia	170,941
Idaho	28,682
Indiana	59.780
Kansas	54,494
Kentucky	82,507
Mississippi	84,140
Nebraska	13,172
Nevada	5,800
New Mexico	21,172
North Carolina	647,365
North Dakota	26,393
Rhode Island	1,986
South Carolina	53,030
Tennessee	87,766
Texas	821,891

However, this chart is, in reality, incomplete. State laws which provide partial agricultural coverage often give the appearance of providing a fair amount of protection, when in fact coverage is almost nonexistent. The National Commission on State Workers' Compensation Laws found that:

> ...the present state of coverage is far from adequate or satisfactory. Because of numerous exclusions, exemptions, and loopholes present in those state compensation laws which treat farmworkers, by no means should these states be thought of as providing coverage for every farm-

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*Source: An Estimate of the Number of Migrant and Seasonal Farmworkers in the U.S. and the Commonwealth of Puerto Rico, Lillisand, Kravitz and McClellan.

> worker....Several states have ambiguous provisions which give the appearance of coverage but in reality are so qualified that only a small segment of the agricultural workforce is covered.

(Supplemental Studies, p. 139)

In those states which provide for limited coverage, the exclusions are frequently convoluted and coverage is difficult to discern. For example, in Florida coverage is provided to:

> Agricultural workers, except those performing agricultural labor on a farm in the employ of a bona fide farmer or association of farmers, employing 5 or less regular employees and who employs less than 12 other employees at one time for seasonal employment in less than 30 days, provided such seasonal employment does not exceed 45 days in the same calendar year.

Maryland's so-called partial "coverage" is more straightforward--migratory laborers are simply excluded from any protection altogether. (See Appendix A for an illustration of the limitations placed on coverage of agriculture employment by current state workman's compensation laws.)

Even in states that provide workman's compensation coverage, farmworkers seldom file compensation claims. One survey is an indicator of how well known the process of workman's compensation is to farmworkers. In 1975 a California survey of 1,477 farmworkers revealed that 70% had never heard of workman's compensation and an additional 8% had heard of it but did not know what it was.

In addition to fair to nonexistent workman's compensation coverage in agriculture, occupational accidents and illnesses are severely underreported. For example, Bureau of Labor statistics accident data is collected through a self-reporting system derived from employers' own records. To begin with, farms with less than seven employees are excluded, as well as family owned and operated farms. This self-reporting process is completed by mail without any mechanism for monitoring, evaluation or validation of the data. Unfortunately, there is no mandatory requirement to report accidents because farmworkers generally are not covered by or are unaware of workmen's compensation. Because farmworkers are frequently housed in rural areas without their own means of transportation or access to medical facilities, and because they lack the money needed for the high cost of medical care, their injuries most often remain unattended to and unreported.

According to Department of Labor statistics, agriculture is the third most dangerous workplace, preceded only by construction and mining in terms of fatal accidents to employees. According to figures compiled by the National Center for Health Statistics, there were 3.6 million persons working as regular or seasonal farmworkers in 1975. Among these workers were 200,000 disabling injuries and 2,100 fatalities--a fatality rate of 58/100,000 workers. This rate far exceeds the average fatality rate--15/100,000 workers--for all industries for the same period. Only two industries had higher fatality rates--construction (61/100,000) and mining (63/100,000). Further, the National Safety Council reports that although farmworkers made up only 4.4% of the national workforce in 1971, they suffered 16% of the occupational fatalities and 9% of the disabling injuries. (N. Ashford, Crisis in the Workplace 321 (1976)). See generally, Appendix B.

The absence of state workmen's compensation data on farmworker injuries and deaths will be interpreted as an absence of injury under this bill. The result will be inspection exemptions for approximately 88% of agricultural workplaces although existing data indicates that agricultural occupations are among the most hazardous in our economy. Accidents and illnesses from farm hazards are also increasing in frequency and severity. (U.S. Department of Labor, BLS Survey for 1978, Office of Statistical Studies and Analysis, OSHA, Jan. 17, 1980).

Technological changes, including increasing mechanization and the use of pesticides, contribute significantly to the dangers of farmwork. The National Safety Council data reveal that the rate of farm fatalities more than doubled between 1949 and 1967. Nonfatal accidents in agriculture are also increasing. They increased from 306.9 per million work hours in 1961 to 375.2 per million work hours in 1967 and the rate of farm accidents exceed the rate of accidents in the workforce as a whole by 15%.

Further, a workplace that cannot be verified as safe based on the workman's compensation data can qualify for exemptions by employer's filing affidavits. With no checks (e.g. mandatory reporting or employee-triggered or routine inspections by OSHA) this bill does not encourage accurate reporting of such accidents. Instead, in order to circumvent being subject to OSHA safety inspections, employers may be encouraged to produce fraudulent affidavits stating that there are no occupational related accidents.

Finally, workplaces that do not meet the criteria on the basis of state workman's compensation data may still be exempt from OSHA safety inspections if they institute advisory safety committees and advisory consultation programs. Such workplaces would also have any penalties for violations sharply reduced.

Advisory safety committees and advisory consultation programs look good on paper but it seems too obvious that workplaces would assure themselves their penalty reduction by instituting them. Instituting them neither guarantees nor pressures employers into implementing the committee recommendations. As defined in the bill, these committees and programs may be made up of employers and employees, or just employees. This vagueness in terms makes certain that employers will control the activities of such committees and programs by having management representatives who merely act as "rubber stamps" for them. Management has not traditionally been a friend to the worker and thus, these committees, even if employees are included, would probably have very little actual say in safety policies and programs.

Further, such committees are, for the most part, effective when instituted to satisfy a contract safety clause. Since, the majority of farmworkers constitute unorganized labor they do not have such clauses demanded for them by representative unions. So, the unorganized farmworker labor force would have little actual say as to what issues these committees address and what actions they take. And even if farmworkers are represented on such committees, management will not be threatened by unorganized labor because they are without union protections. OSHA has been the only protection for farmworkers, as an unorganized labor force, and if this bill is passed, management will not feel pressured or threated to respond to farmworker safety complaints.

The President's Interagency Task Force *Report on Workplace Safety and Health* has asserted that injury prevention must be the shared responsibility of management, workers and unions. Again, we assert that since the majority of farmworkers are not represented by unions, they are subject to the arbitrary discretion of their employers in terms of determining what injuries and/or deaths are worthy of prevention. No employer wants to admit that he/she is harboring unsafe workplace situations--and they won't--unless OSHA can continue its mandate of setting and enforcing the occupational health law.

One of the most destructive elements of this bill is the fact that it would prevent OSHA inspections that have in the past been triggered by employee complaints, until after the employer has been notified and given an opportunity to provide "assurances" (a discretionary and arbitrary term at best) that the subject of the complaint will be corrected. However, no definitions are set out by this bill to deal with these requirements. This process would only delay any farmworker-triggered safety inspection until the end of a harvest season when employers could close their camps, correct the violation and thereby avoid any inspection of other possible safety violations that may have been in "plain view" at the time of the farmworker-triggered inspection.

The exceptions to the exemptions provided by this bill are of a tragic nature. If a "serious accident or death" occurs an employer will be subject to an inspection--AFTER it occurs. If it is determined that there exists an "imminent danger" or hazard so serious that it warrants an inspection without the Secretary first giving notice to an employer--an inspection may be undertaken. And if the Secretary has "reasonable grounds" to believe a violation exists, an inspection may be made, BUT only with notice to the employer and only if the employer has given no satisfactory assurance that appropriate action was taken to correct the violation--who decides and how what a "satisfactory assurance" is? As Dr. Eula Bingham said in a statement before the Industrial Union Department of the AFL-CIO in January, 1980:

> This amendment would be a step backward to the pre-OSHA days when employers found it more profitable to wait until someone got hurt than to spend any money to clean up the workplaces.

Such exceptions only mean that if a worker is seriously injured or even killed in an occupationally related accident, his/her employer has several ways to avoid being penalized. The preventive aspect of OSHA will be totally neutralized.

The monetary penalties provided by this bill also make it cheaper for employers to risk fines than to correct safety violations. Contrary to the popular belief that farmworkers are hired en masse, they are often hired in groups of 10 or less to work in particular harvest regions. Of the nation's 5,215,232 farmworkers, 60.4% were employed on farms with less than 9 employees. And of 700,941 farms 83% employed less than 10 employees. (1974 Census of Agriculture) Thus, again the bill is detrimental to all workers and particularly to farmworkers because no penalties whatsoever are assessed if fewer than 11 workers are employed.

CONCLUSION

The bill, S. 2153, is inconsistent with the Occupational Safety and Health Act of 1970 and constitutes a denial of basic equity to farmworkers by eliminating OSHA's prevention and protection mandates. Farmworkers have been particularly affected by business attempts to limit OSHA coverage in previous years. In 1976 and 1977 Congress refused to appropriate funds for OSHA inspection of farms with fewer than 11 employees. However, in 1978 and 1979, the Appropriations Committee changed its mind and decided to cover small farms if they used temporary labor camps. Now it seems that Congress has changed its mind again and is intent on taking away previous protections and leaving farmworkers stranded. New legislation should seek to break old patterns of injustice and in the case of farmworkers, legislation that neglects and discriminates against them has been prevalent. It is imperative that this bill be defeated in order to continue to guarantee equal protection to farmworkers.

Data has shown that farmworkers are suffering from increasing exposure to occupational injuries. Farmworkers, whose income grants, at best, marginal subsistence, have a great need for the protections afforded by OSHA. The agricultural workplace should have the same responsibilities as other employers to protect the health and safety of their workers. However, passage of this bill would only serve to debilitate that protection and re-institute a policy of neglect.

In effect this bill sanctions non-reporting of occupational injuries and deaths and non-compliance with OSHA safety standards by employers. We all agree that OSHA should concentrate on the most hazardous workplaces. But, how will we ever know which they are without the mechanisms currently provided, e.g. employee-triggered inspections, routine general or specific inspections. OSHA does concentrate on the most hazardous workplaces by screening complaints and then inspecting workplaces with alleged safety violations. OSHA is listening to the workers whose complaints provide a "mechanism for assuring workers an effective voice in the program." (Statement authorized by Dr. E. Bingham, Dec. 19, 1980). These mechanisms allow workers the basic protection of having a voice in workplace safety which affects them intimately.

Further, this bill's provisions have not been proved necessary. Rather, this bill is a means to eliminate all safety inspections, emasculate enforcement of regulations promulgated under OSHA's authority and therefore the prevention and protection originally mandated are done away with. In addition, it eliminates OSHA's flexibility and thereby its deterrent effect on employers by limiting and, in some cases, totally restricting OSHA enforcement authority.

Employers are currently required to report workplace injuries and deaths and are thus subject to OSHA authority. But farmworkers don't file claims on injuries either because they are not covered or they don't know about workman's compensation. So, OSHA's preventive and protective role will be thwarted by the use of workman's compensation data and advisory safety and consultation programs to exempt employers. Prior to the passage of OSHA, employers found ways to justify unsafe working conditions (usually based on monetary considerations) and this bill gives them a blank check on returning to the old way.

Congress seems to find that OSHA problems with enforcement are due to its spending time investigating safe rather than unsafe workplaces. However, Lane Kirkland, AFL-CIO President, stated that we cannot "overlook the fact that workplace fatalities have decreased 10% and there has been an overall 15% decline in workplace injuries." (Washington Post, April 2, 1980) Under this bill, OSHA won't spend its time investigating any workplaces--it will be too bogged down with recordkeeping.

It is time to strengthen OSHA, not weaken and destroy it altogether. NAFO and its member organizations see a clear mandate for this committee to follow:

-don't penalize farmworkers for hazards that are within the realm of an employer's responsibility, and

-don't allow uncooperative employers to disobey the prevention and protection mandates of OSHA--make them obey the law.

In conclusion NAFO sincerely hopes and urges this committee to not further cripple OSHA by implementing this bill.

APPENDIX A

RECEIVED MAR 2 7 1979

U. S. Department of Labor
Employment Standards Administration
Division of State Workers' Compensation Standards

January 1, 1979

Table 3. COVERAGE FOR AGRICULTURAL WORKERS

The National Commission on State Workmen's Compensation Laws, in its 1972 Report, proposed in part, that....."as of July 1, 1975, farmworkers be covered on the same basis as all other employees." Fourteen States 1/ cover agricultural workers in accordance with this recommendation.

Twenty-one of the remaining States carry limitations for agricultural employment which is not applicable to other covered employees, as is shown in the following table.

Those jurisdictions not listed herein permit agricultural employers to secure coverage voluntarily, although such provisions are not statutorily prescribed.

1/ Arizona, California, Colorado, Connecticut, Hawaii, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, Ohio, Oregon, and Puerto Rico.

STATES IN WHICH WORKERS' COMPENSATION LAWS APPLY TO

FARMWORKERS

State	Farmworkers Covered & Type of Coverage		Numerical Exemptions
Alaska	Agricultural employees, except those employed on a part-time basis.	Compulsory	None
Delaware	Agricultural employees whose employer insures the payment of compensation for such workers. Family members are included if they are bona fide employees and are named in the employers contract for insurance.	Elective	None
Florida	Agricultural workers, except those performing agricultural labor on a farm in the employ of a bona fide farmer or association of farmers, employing 5 or less regular employees and who employs less than 12 other employees at one time for seasonal employment in less than 30 days, provided such seasonal employment does not exceed 45 days in the same calendar year.	Compulsory	3
Illinois	All agricultural workers except those working for an employer who employs less than 500 man days of agricultural labor per three months during the preceding calendar year exclusive of the employer's spouse and other members of his immediate family residing with him.	Compulsory	
Iowa	Agricultural employees covered if the farm employer's total cash wage payments during the preceding year amount to at least $1,000.	Compulsory	None

STATES IN WHICH WORKERS' COMPENSATION LAWS APPLY TO FARMWORKERS (cont.)

State	Farmworkers Covered & Type of Coverage		Numerical Exemptions
Maine	Agricultural workers, except seasonal or casual. However, an employer of 4 or less farmworkers may secure the payment of compensation by obtaining an employer's liability insurance policy (total limit not less than $25,000 and medical payment coverage of not less than $1,000).	Compulsory	None
Maryland	Agricultural employees covered if the farm employer has 3 or more full-time employees or a yearly payroll for his full-time employees of $15,000. Non-machine-operating migratory laborers and office workers exempt from coverage.	Compulsory	See column 2.
Michigan	(a) Farmworkers working for an employer who regularly employs 3 or more employees at one time; (b) Farmworkers working for an employer who regularly employs less than 3 employees if at least one of them has been regularly employed by that employer for 35 or more hours per week for 13 or more weeks during the preceding 52 weeks.	Compulsory	See column 2.
Minnesota	Farm laborers who do not work for a "family farm". Defines "family farm" as any farm operation which pays less than $4,000 in cash wages, exclusive of machine hire, to farm laborers for services rendered during the preceding calendar year.	Compulsory	None

STATES IN WHICH WORKERS' COMPENSATION LAWS APPLY TO

FARMWORKERS (cont.)

State	Farmworkers Covered & Type of Coverage		Numerical Exemptions
Missouri	Requires compulsory coverage of farm laborers whose employers' annual payroll is in excess of $2,500.	Compulsory	6 employees.
New York	Requires workers' compensation coverage of farm laborers for 12 months from April 1, if the farmer's total cash wage payments during the preceding calendar year amount to $1,200 or more; farmworkers supplied to farmer by a farm labor contractor would be deemed to be employees of the farmer.	Compulsory	None
Oklahoma	All workers employed in agriculture or horticulture by an employer who had a gross annual payroll, including money paid to independent contractors, in the preceding calendar year of $25,000 or more.	Compulsory	2 employees.
Pennsylvania	All agricultural workers if employer pays one agricultural worker wages of $150 or more or furnishes employment to one employee in agricultural labor on 20 or more days during a calendar year.	Compulsory	None

STATES IN WHICH WORKERS' COMPENSATION LAWS APPLY TO FARMWORKERS (cont.)

State	Farmworkers Covered & Type of Coverage		Numerical Exemptions
South Dakota	Workers engaged commercially in the operation of threshing machines, grain combines, corn shellers, corn huskers, shredders, silage cutters, and seed hullers for profit.	Compulsory	None
Utah	All agricural workers except: employees who are family members; employers whose cash payments to one or more employees amounted to less than $2,500 during the preceding calendar year; or employers who do not employ at least four persons for 40 hours or more per week per each employee for 13 consecutive weeks during any part of the preceding 12 months.	Compulsory	None
Vermont	All agricultural workers except those working for an employer whose aggregate payroll is less than $1,000 in a calendar year.	Compulsory	None
Virginia	Agricultural workers working for an employer who during the previous calendar year has developed a payroll of $15,000 or more per year, or who regularly employs more than 4 full-time employees.	Compulsory	3 employees.
Washington	All agricultural employees except those who earn less than $150 per calendar year from one employer, or any child under 18 employed by his parents in agricultural activities on the family farm.	Compulsory	None

STATES IN WHICH WORKERS' COMPENSATION LAWS APPLY TO

FARMWORKERS (cont.)

State	Farmworkers Covered & Type of Coverage		Numerical Exemptions
West Virginia	Employees of an employer who has 6 or more workers in agricultural service.	Compulsory	See column 2.
Wisconsin	Farmworkers working for an employer, who become subject to the Act 10 days after he has employed 6 or more employees, whether in one or more locations on 20 or more days during the calendar year.	Compulsory	See column 2.
Wyoming	Workers engaged in power farming when one or more are employed for an average of 6 months each year. "Power farming" means work on a farm, livestock ranch, or poultry farm, which uses in connection with its operation any power-driven equipment, such as a pick-up truck, feed grinder, stacking machinery, tractor, mower, baler, or road grader.	Elective	None

APPENDIX B

	1972 Injury/Illness Incidence Rates	1978 Injury/Illness Incidence Rates	Percent Change 1972-78	Fatalities*	
				1975	1978
Alabama	11.0	10.0	-9.1	66	156
Alaska	14.4	10.0	-30.6	74	43
Arizona	15.1	***	***	42	***
Arkansas	18.8	10.3	-45.2	75	74
California	12.6	10.5	-16.7	527	492
Colorado	12.9	***	***	77	***
Connecticut	9.8	9.1	-7.1	30	31
Delaware	8.2	6.6	-19.5	14	11
Dist. of Columbia	8.5	***	***	27	***
Florida	12.6	10.2	-19.0	281	256
Georgia**	—	—	—	—	—
Hawaii	13.4	***	***	21	***
Idaho	16.7	***	***	25	***
Illinois**	11.7	—	—	—	—
Indiana	11.6	9.9	-14.7	109	105
Iowa	11.7	10.4	- 11.1	92	54
Kansas	7.8	8.8	+12.8	47	127
Kentucky	10.8	9.6	-11.1	103	79

	1972 Injury/Illness Incidence Rates	1978 Injury/Illness Incidence Rates	Percent Change 1972-78	Fatalities*	
				1975	1978
Louisiana	11.0	9.4	-14.5	161	194
Maine	11.8	11.7	-.8	30	41
Maryland	10.6	8.5	-19.8	61	52
Massachusetts	10.6	***	***	77	***
Michigan	16.0	8.7	-45.6	173	262
Minnesota**	—	***	***	92	***
Mississippi	10.1	***	***	61	***
Missouri	10.3	9.3	-9.7	143	150
Montana	13.5	10.0	-25.9	29	29
Nebraska	10.7	9.8	-8.4	56	48
Nevada**	—	—	--	—	—
New Hampshire**	11.6	—	—	—	—
New Jersey**	11.1	--	—	—	—
New Mexico	10.3	8.4	-18.4	32	50
New York**	7.0	—	—	—	—
N. Carolina	10.1	7.6	-24.8	103	104
N. Dakota	8.1	***	***	14	***
Ohio**	--	—	—	—	--
Oklahoma	10.5	***	***	90	***
Oregon	18.4	14.0	-23.9	110	61

	1972 Injury/Illness Incidence Rates	1978 Injury/Illness Incidence Rates	Percent Change 1972-78	Fatalities* 1975	1978
Pennsylvania	10.1	9.6	-.5	182	172
R. Island	10.4	9.3	-10.6	16	24
South Carolina	9.4	7.5	-20.2	45	73
South Dakota	9.2	8.8	-4.3	9	4
Tennessee	11.0	***	***	91	***
Texas**	11.0	—	—	—	—
Utah**	—	***	***	53	***
Vermont	10.5	9.6	-8.6	4	4
Virginia	10.0	***	***	107	***
Washington	13.6	11.7	-14.0	100	151
W. Virginia	10.8	9.3	-13.9	60	152
Wisconsin	11.9	***	***	85	***
Wyoming	11.0	10.0	-9.1	49	45

* The occupational injury and illness data excludes farms with fewer than 11 employees. However, these employees may be included in the annual average employment.

** State did not participate in survey for years where no data appears.

*** Data not available until later in 1980.

URBAN ENVIRONMENT CONFERENCE, INC.

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Founded By:
Philip A. Hart
1912—1976

May 8, 1980

Senator Harrison A. Williams
Chairman
Senate Labor and Human Resources
Committee
4230 Dirksen Senate Office Bldg.
U.S. Senate
Washington, D.C. 20510

Attn: Michael Goldberg

Dear Senator Williams:

Enclosed is testimony for inclusion into the hearing record on S.2153, S.1486, and S.1572, all now under consideration by the Senate Committee on Labor and Human Resources.

The testimony is that of an individual worker (who wishes to remain anonymous) who describes the discrimination he faced for acting to improve his workplace, and further describes the poor handling of his claim by OSHA.

I would appreciate acknowledgement of the receipt and inclusion of this testimony.

Sincerely yours,

Brett C. Hill

Brett Hill
Special Projects Coordinator

Enclosure:
BH/dj

TESTIMONY BEFORE THE COMMITTEE ON LABOR AND HUMAN RESOURCES OF THE U.S. SENATE

By an individual

MARCH 21, 1980

Testimony on the OSHA Effort to Protect Workers from Discrimination

The 11(c) Program

This testimony is organized as follows: Introduction, Recommendations for changes in the 11(c) program, Justification for the recommendations.

INTRODUCTION

The Occupational Safety and Health Act of 1970 is an excellent law. It was passed in recognition of the fact that an ounce of prevention is worth a pound of cure. It is vitally important that Congress undertake no action to undercut the ability of OSHA to reduce the tragic toll in human suffering which is resulting from the existence of unhealthful working environments. The widespread use of chemicals and chemical processes is a major cause of industrial disease and death. NIOSH has compiled a list of over 20,000 different toxic chemical substances of which over 2000 are suspected carcinogens. Thousands of new chemicals are created each year and hundreds of these enter commercial production each year. Millions of workers are being exposed to these toxic substances. Nearly 400,000 Americans die of cancer each year; a Department of Health and Welfare study indicates that 20 to 40 percent of these deaths are workplace-induced. The Public Health Service conservatively estimated in 1970 (the year Congress passed the OSH Act) that 390,000 new cases of industrial diseases occurred each year.

These figures leave no doubt as to the staggering human and economic costs which result from an ineffectively administered OSHA. What is needed is a much stronger enforcement effort on the part of OSHA than has heretofore been the case.

I do not believe it is widely appreciated that the laudable goals of the OSH Act are currently being undermined by the policy of the U.S. Department of Labor of not properly enforcing the statutory provisions of the OSH Act which prohibit employment discrimination against employees who exercise rights (e.g., filing health and safety complaints) under the act.

For the OSH Act to be an effective instrument for achieving meaningful improvement in health and safety working conditions in the U.S., it is essential that employees take an active involvement. Very frequently, it is employees themselves who are in the best position to know of the existence of workplace health and safety hazards. If employees feel intimidated by their employer and are threatened with retaliation, they are very unlikely to call attention to hazardous work environments or to file health and safety complaints. As a consequence, the hazardous conditions go unrecognized, unacknowledged, and uncorrected; the salutary goals of the OSH Act are effectively sabotaged by management.

In passing the OSH Act, Congress recognized the fundamental cause-and-effect relationship between protecting workers from employer retaliation and effective practical implementation of health and safety standards in the workplace. Therefore, Congress provided a strongly worded provision to protect employees against employer reprisals. This provision is a cornerstone of the Act. This Section 11(c) protection would be an effective deterrent against occupational health and safety related employment discrimination - if the U.S. Department of Labor took the congressional mandate seriously and made a good faith effort to stringently enforce the law. Sadly, the Department of Labor has not done so. The failure of the Department of Labor to enforce Section 11(c) with anything remotely resembling stringency is exerting a debilitating influence on the necessary and desirable effort to achieve healthier and safer workplaces throughout the United States.

I am a complainant in an OSHA discrimination case. For a variety of reasons my case has served as an "acid test" of the efficacy and motivation of the U.S. Department of Labor in its administration of the anti-discrimination law.

My difficulties with my employer began when I had severe allergic attacks on exposure to certain chemicals. I politely complained to the company. The company physician wrote a work restriction to restrict me from the offending exposure (which constituted only one percent of my total work responsibilities). My supervisor castigated me for my health complaint and threatened to fire me. I then made a health complaint to Cal OSHA. The company escalated its retaliation against me and has since engaged in a protracted campaign of continuing and multiple violations of my 11(c) rights. The retaliation included 1) multiple threats to terminate my employment, 2) an attempt to coerce me to violate the physician's work restriction, 3) threats to smear my reputation, 4) without my knowledge, placing in my personnel files five documents which contain malicious falsehoods about my character and work performance and which implicate me as having complained to OSHA, 5) an involuntary transfer to a less desirable job, 6) denial of a contractually promised promotion, 7) a substantial reduction in my compensation, 8) blacklisting me, 9) various forms of harassment, 10) termination of my employment. A clear intent of much of the above treatment was to "persuade" me to resign.

When I discovered the libelous memos in my personnel file, I filed an 11(c) complaint with the U.S. Department of Labor, OSHA, Operations Review Office. However, I was not visited by an investigator until 4 months later. It turned out that the reason for this delay was to allow an OSHA official to arrange a California vacation for the investigator (from out of state). This investigator intended to get a withdrawal, refused to accept all of my evidence, and failed to conduct an investigation. Instead, he disappeared back to his home state. During this 4 month interlude of Labor Dept. inaction, the company had committed further violations (denied my promotion, cut my compensation) which could have been prevented by timely Labor Department action and stringent enforcement.

I succeeded in having the case transferred to another investigator. The new investigator also refused to accept all of my evidence and it became clear that the Labor Department wanted to make an extremely minimal finding in order to cover up the serious employer violations which had been permitted to occur as a result of the Labor Department misconduct involving the first investigator and the 4 month delay. Several months later, the new investigator tried to force me to sign an extremely weak settlement agreement (It provided for no more than the removal of two of the five improper documents from my personnel file). Simultaneously, the investigator withdrew previously repeated and unwavering assurances to take actions to protect me from further retaliation (for filing the 11(c) complaint). It was clear to me that the Labor Department had created a climate in which the company could feel they had been given the green light to terminate my employment so long as they did not leave behind a signed confession. I refused to sign and was trying to negotiate for a stronger settlement when the company did, indeed, terminate me.

Prior to Labor Department involvement, the company engaged in reprisals designed to coerce me to resign. Fear of the law apparently made the company wary of such a direct action as termination. After Labor Department involvement, this fear disappeared and I was terminated.

For 2 months following my termination (which occurred during the course of an open Labor Department 11(c) investigative proceeding) the Labor Department refused to respond to any of my communications and only did so after my congressman sent a letter to OSHA on my behalf. Four months after the termination, the investigator - without conducting any investigation - recommended that no 11(c) violation be found in regard to the termination. Because of the intervention of my congressman and senator, this recommendation did not become official. The case was transferred to the eastern region of the country and assigned to another investigator. Six months have now passed since my termination and the Department of Labor has yet to obtain a scintilla of evidence from the company to contradict my prima facie case. And 13 1/2 months have passed since I originally filed my 11(c) complaint. To date, the U.S. Department of Labor has taken no action on my behalf.

This highly condensed case history barely hints at the misconduct and malfeasance of the Labor Department in my 11(c) case. The abuses at the hands of the Labor Department which I have personally experienced are, perhaps, somewhat more elaborate than in the average case. But it is clear that this extensive history of abuse could not have occurred in a properly administered 11(c) program. The lack of good faith by the Labor Department in my case is not atypical or unrepresentative. Rather, the handling of my case is symptomatic of widespread corruption, incompetence, and malfeasance within the Operations Review Office which is charged with enforcing Section 11(c). The quantity and quality of evidence of 11(c) violations in my case is very strong for a discrimination case. If the Labor Department refuses to enforce the law in my case, it cannot be expected to properly enforce the law in 99 percent of 11(c) cases.

OSHA has previously come under serious criticism for its lackluster record on 11(c) enforcement (see BNA OSH Reporter, Sept. 14, 1978). The debilitating administrative weaknesses of OSHA's anti-discrimination program prompted the Philadelphia Area Project on Occupational Safety and Health (PHILAPOSH) to submit to OSHA in early 1978 an admirable list of recommended administrative changes. And, although Zoltan Bagdy, Chief, Division of 11(c) Programs indicated in September 1978 that some of these recommendations would be put into effect within a few months, none of the PHILAPOSH recommendations were ever adopted.

The ineffectual administration of the federal 11(c) program has unfortunate ramifications for the caliber of state anti-discrimination programs. State programs are required by law to be as effective as the federal program. State programs are not generally thought to be effective. Excepting the approximately 24 states with OSHA programs, employees have no recourse but to rely upon the federal program.

Furthermore, it appears that persuading the U.S. Department of Labor to enforce the law is much more difficult for employees not represented by a union. These, of course, are the employees most in need of the government's 11(c) protection. Roughly 80 percent of the workforce is non-union; health hazards do not discriminate between union and non-union employees.

To achieve effective implementation of the OSH Act and to ensure the civil rights of workers who have been afforded statutory protection against discrimination by Congress, the industry-indentured practices of the Labor Department's 11(c) program must be ended. For too long, the Labor Department has been bending over backward to appease business and industrial interests. It is high time for the Labor Department to begin to effectively and stringently enforce the law prohibiting OSHA-related employment discrimination.

To achieve this goal, two major problem areas must be remedied. One problem is the systematic and institutionalized denial of due process at every adjudicative step to the victims of employment discrimination. The other problem involves the administrative and investigative personnel in the 11(c) program. Competency and motivation to enforce the law are currently in very short supply in the 11(c) program. A major overhaul of Operations Review Office personnel will be required.

RECOMMENDATIONS

I. A. When any person approaches OSHA to ask about their 11(c) rights or to file an 11(c) complaint, OSHA shall be required to provide them, free of charge, with an informational package. This package shall contain:

(1) the complete regulations implementing Section 11(c) [29 CFR Part 1977];

(2) a thorough and precise description of the investigative process and procedures; procedures surrounding hearings (at present, no hearings are held); rights of appeal; rights to case information under the Freedom of Information Act and the Privacy Act; etc.;

(3) a concise, easy-to-understand description of what elements constitute good evidence in discrimination cases and what constitutes a prima facie case. (This section of the informational package should follow along the lines of Rothstein, M.A. 1978. Occupational Safety and Health Law. West Publishing Co., pp 200-206.);

(4) notification that the complainant has the right to be represented by counsel in all proceedings and investigations;

(5) notification that the complainant may also file an unfair labor practice charge with the National Labor Relations Board.

B. No 11(c) complaint may be disposed of through withdrawal unless the complainant signs a consent form which states that the complainant has read and understands the information in the informational package, that the complainant understands 11(c) rights, and that the complainant realizes that by withdrawing the complaint those rights are forfeited.

C. Any complaint which is withdrawn without the complainant's written consent must be reopened if the complainant so requests within 6 months of the withdrawal.

II. A. A hearing must be provided for at some stage of the adjudicative process - either initially, upon showing of a prima facie case by the complainant, or as part of the appeals process following an adverse investigative decision.

B. Until such time as OSHA has incorporated a hearings process into its adjudicative structure:

(1) Prior to an investigative recommendation to dismiss any charged 11(c) violations, a complainant must be provided with full disclosure of the employer's defense and any charges by the employer against the complainant. The complainant must be allowed an opportunity to refute the employer's defense and any charges by the employer against the complainant. The complainant must be allowed to refute the employer's defense and charges point-by-point, providing additional evidence or witnesses, if the complainant so desires;

(2) Prior to an appeal, the complainant must be provided with full disclosure of the employer's defense and must be given a complete and detailed itemization of the specific factual, logical, and legal reasons why the Operations Review Office has dismissed each and every component of the complaint.

III. If only the complainant cooperates in the investigation, a situation will result whereby the evidence presented by the complainant, if it constitutes a prima facie case, warrants a determination that the charged party has violated the law. Whenever OSHA requires the complainant to provide a signed, sworn statement, the failure of the employer and its agents to also provide signed, sworn statements shall be considered indicative of the lack of a meritorious defense on the part of the employer.

IV. The complainant must have the right to appeal an adverse decision by the U.S. Department of Labor to the federal courts. If, in such an appeal, the court overrules any part of the Labor Department decision, the Labor Department must pay all court costs and attorney fees incurred by the complainant in such action. (Legislative action may be necessary to accomplish this change.)

V. The practice of the Secretary of Labor entering into involuntary settlements - with the consent of the employer, but without the consent of the complainant - must be ended. No final settlement shall be concluded unless agreed to by the complainant. Settlement agreements which include back pay shall not give credit to the employer for any funds which the employee may have received from unemployment insurance or welfare agencies. Whenever a voluntary negotiated settlement cannot be reached within 30 days of the determination of merit, the Regional Solicitor of the U. S. Department of Labor shall be required to initiate litigation against the employer in federal district court.

VI. The 30 day filing time limit shall be changed to a 6 month filing time limit from the time a complainant first learns that a violation of his rights has occurred until the complainant must file an 11(c) complaint.

VII. An employer may not, in any manner, introduce materials into any of its Personnel Files which relate to the exercise by an employee of any protected activity under the Occupational Safety and Health Act. "Personnel Files", as used herein,are defined as any files, records or compilations maintained at any level by an employer which are used to evaluate or review an employee for any favorable or unfavorable personnel actions, including, but not limited to promotions, salary increases, bonuses, terminations, transfers or recommendations to other employers. The presence of any such material in any Personnel File shall constitute a meritorious case of 11(c) violation.

VIII. Operations Review Office [11(c) Program] Personnel:

Even with adequate reform of the U.S. Department of Labor's 11(c) enforcement policies and procedures, the intent of the law may continue to be undermined by ORO administrators and investigators who have little, if any, commitment to the goal of protecting workers from occupational health and safety related employment discrimination. Many of the ORO administrators and investigators were installed during the tenure of a national administration hostile to the salutary goals of OSHA. At least some of these employees obtained their positions precisely because they are hostile to employee rights and effective implementation of the OSH Act. Aside from motivation, the professional qualifications and competency of many ORO employees are suspect. Unfortunately, most, if not all, of the ORO administrators and investigators are civil servants. A method should be devised to replace, immediately, as many of these personnel as possible. At a minimum, all of the administrators of the 11(c) program should be removed. Their replacements should be appointed directly by the Assistant Secretary for Occupational Safety and Health. The vacancies should not be filled by promotions from within the ORO. The replacements should come from outside the ORO.

JUSTIFICATION

The Fifth and Fourteenth Amendments to the Constitution of the United States prohibit the denial to any individual of due process of law or the denial to any individual of the equal protection of the laws. These Bill of Rights provisions guarantee that the laws enacted by the federal government and the acts of federal government representatives, pursuant to these laws, will not infringe upon the right of the individual to due process of law. A procedure may not be established and called "due process" unless it conforms to certain fundamental ideas of fairness which are traditional in the English-speaking world and which have generally been perceived as morally obligatory in every civilized community. What are the elements which a procedure must have to constitute due process? Firstly, due process requires that an individual be notified of any charge or claim against him and that, on demand, he be furnished with a bill of particulars specifying the exact nature of such charge or claim. Other elements which must be present include the right of an individual to confront his accusers and witnesses against him, the right to counsel, the right to summon witnesses on his behalf to refute charges against him, and the right to provide rebuttal to any charges against him. Perjured testimony is inconsistent with due process and every effort must be made to ensure that such testimony is excluded from consideration.

Denial of due process can only be justified by the intolerable assumption that anyone charged must be guilty and so doesn't deserve an adjudication with due process of law. Governmental secrecy and violation of the legal priciple of due process are unacceptable in a free society. In the United States, denial of due process would be an unconscionable affront to our ideals of justice and fair play and would constitute a breach of faith with our Constitution. Such considerations notwithstanding, the U.S. Department of Labor has instituted procedures, pursuant to 11(c) complaints, which constitute a systematic and institutionalized denial of due process to the 11(c) complainants who are the victims of illegal discrimination. As a general rule, the U.S. Department of Labor has been acting as the first line of defense for industry against its victims.

The U. S. Department of Labor does not hold hearings at any stage in 11(c) cases. Therefore, the investigation itself constitutes the adjudicative process. Typically, the investigatory process is little more than a kangaroo court. The investigator acts as prosecutor, judge, and jury; and it is usually the complainant - and not the employer - who is put on trial. Under the current administrative structure, 11(c) investigators are widely dispersed and experience very minimal direct supervision. These investigators enjoy virtually unlimited discretion. It is a situation ripe for abuse.

When one analyzes OSHA's own statistics on disposition of 11(c) cases (see, for example, BNA OSH Reporter, Sept. 14, 1978) and compares them, for example, with the disposition by the NLRB of unfair labor practice charges, it is immediately apparent that OSHA has a very poor record indeed. However, OSHA's 11(c) performance is even worse than the statistics indicate, for reasons which will become clear. The following is an outline of the abuses (including systematic denial of due process to complainants) which are commonly found.

1) Investigators frequently attempt to con complainants into withdrawing meritorious complaints. Two tactics are utilized: a) Very long and deliberate delays to discourage the complainant, b) Capitalizing on the ignorance of many complainants. Investigators may manipulate complainants by making misleading and discouraging statements concerning interpretation and application of the law, the chances of obtaining a settlement or winning in litigation, etc.

The fact that many investigators seek as many withdrawals as possible, irrespective of the case merits was leaked to me by a source within OSHA. Concern with OSHA's unstated policy of seeking withdrawals in meritorious cases was also raised in 1978 by an OSHA acting area director (see BNA OSH Reporter, Sept. 14, 1978). In my own 11(c) case, OSHA delayed for 4 months before sending an investigator for an initial conference with me. Prior to this conference, and without any knowledge of the merits of my case, this investigator stated to a colleague that he expected to get a withdrawal in my case.

OSHA's unstated policy on seeking withdrawals results in a very high percentage of "voluntary withdrawals" and is a major reason for Recommendation I which is designed to ensure that complainants have sufficient knowledge to be able to judge when they are being gulled by an 11(c) investigator.

2) In merit cases in which complainants do not withdraw, investigators will frequently attempt to obtain dismissal. The investigator displays a very keen eye toward finding some obscure loophole which might be used to rationalize letting the employer off the hook. The same level of diligence is not exercised with regard to uncovering or interpreting evidence damaging to the employer. One ploy of the investigator is to decline to accept all of the evidence a complainant has to offer. The complainant will be told that it is not necessary to anticipate every potential employer defense and that the investigator will return at a later date if further evidence is needed. The investigator later refuses to accept the additional evidence (see no. 4 below) and dismisses the complaint for "insufficient evidence". Or the investigator may even dismiss a merit complaint without interviewing witnesses or conducting any kind of investigation whatsoever.

3) A complaint may comprise a number of separate, but related, charges or components. If the investigator finds it would arouse undue suspicion by dismissing the entire complaint, he may then set his sights on the most minimal possible finding of violation. Thus, although the disposition of such a case will eventually be statistically recorded as a "settlement", such settlements tend to be extremely unsatisfactory. (see statement of an OSHA labor liasson in BNA OSH Reporter, Sept. 14, 1973.)

An investigator may achieve his minimal finding (or complete dismissal) by stretching the interpretation of the law to the furthest limits of its language or beyond. The "ploy for not accepting evidence" and/or the "non-investigation" (discussed in no. 2 above) may be used with regard to any of the separate components making up the entire complaint. In reaching his determination, the investigator may also a) completely ignore key pieces of evidence in his possession, b) make convoluted arguments which misconstrue the logical relationships between evidentiary elements, c) refuse the complainant the right to respond to or rebut the employer's position (see no. 4 below). Obscure, contorted, bizarre, and nonsensical interpretations are frequently latched onto by the investigator in an effort not to find 11(c) violations.

In my 11(c) case, for example, the employer introduced into my personnel files memos which implicated me as having filed a health complaint with OSHA (see Recommendation VII). The clear intent and purpose of the employer in producing and introducing these memos into my files was twofold: a) to attempt to discredit me, b) to blacklist me. The memos falsely implied that my complaint was unwarranted and, to this end, grossly distorted the findings of an OSHA inspection. The production of the memos followed shortly after the employer threatened to create documentation to smear my reputation if I refused to voluntarily resign (I refused to resign). These memos were not addressed to or sent to me. Instead, these memos were secretly introduced into my personnel files. I was completely unaware of their existence until some time later when I chanced upon them together with other improper retaliatory documents which had also been secretly introduced into my personnel files at the same time.

Yet the 11(c) investigator refused to include the removal of these memos as part of his proposed settlement. His ludicrous justification was that the memos constituted a "good faith" effort by the employer to "communicate with" me about health conditions. Such an argument would represent the desperate, last-ditch attempt by an employer's attorney to salvage a losing case. Nevertheless, it was adopted by the 11(c) investigator.

I might surmise here that the tactics for dismissing cases or reaching minimal, unsatisfactory settlements as outlined in nos. 2 and 3 were all displayed in my own 11(c) case. Furthermore, the investigator in my case attempted to coerce me into signing his unsatisfactory settlement agreement by threatening to dismiss my complaint in its entirety.

4) The opportunity to present a defense to the opposing side's charges, allegations, or position is not reciprocal. This opportunity is granted to the employer - but not to the employee. This is the case even if the investigator uses the employer's position and charges against the complainant as the basis for dismissing the complaint. The investigator informs the employer who the complainant is and what the complainant's allegations are and provides the employer with the opportunity to produce a defense and refute the complainant's allegations. The investigator then denies due process to the complainant by refusing to fully disclose the employer's defense and charges against the complainant (The investigator refuses to give the complainant a "bill of particulars"). The investigator refuses to permit the complainant the opportunity to refute the employer's charges and defense, to confront witnesses against him, or to provide

additional evidence or witnesses.

Furthermore, OSHA requires the complainant and the complainant's witnesses to provide signed, sworn statements of the facts but does not make any such requirement of the employer or the employer's witnesses. Thus, there is no incentive to discourage the employer from telling lies. This is yet another facet of the systematic denial of due process in that no attempt is made to exclude "perjured testimony" by the employer and because different standards of credibility are applied to the complainant than to the employer. The complainant is considered not to have any credibility if he does not agree to produce a signed, sworn statement. However, the employer is not considered to be lacking in credibility if he and his witnesses refuse to produce signed, sworn statements. This is a clear violation of the principle of equal protection under the law.

[It is interesting to note that, in not requiring employers to produce signed, sworn statements, the U.S. Department of Labor is protecting employers from application of Section 17 (g) of the OSH Act. Section 17 (g) states that "Whoever knowingly makes any false statement, representation, or certification in any ... document filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both."]

5) A major reason why 11(c) settlements are so often unsatisfactory (see BNA OSH Reporter, Sept. 14, 1978) derives from the OSHA policy of entering into involuntary settlements against the will of the complainant. [In contrast, the NLRB will not enter into an involuntary settlement.] If the employer refuses to accept the terms of a proposed settlement, the U.S. Department of Labor may institute litigation. From the employer's point of view, this constitutes an appeal. And in the litigation itself, the employer will, of course, be granted due process. (It should be pointed out here that cases recommended for litigation by OSHA are not automatically acted on by the office of the Solicitor of Labor - see below.) On the other hand, if the complainant refuses to accept the terms of a proposed settlement, the Secretary of Labor may enter into the agreement with the consent of the employer - but without the consent of the complainant. The complainant will then have no recourse but to "appeal" to the Deputy Assistant Secretary of Labor for OSHA. However, unlike the appeal avenue open to the employer, the appeal procedure afforded the complainant is designed to deny due process to the complainant (see no. 6 below). The review resulting from the "appeal" by a complainant is usually only cursory and amounts to a rubber stamp of the field office's disposition. The complainant, unlike the employer, has no recourse to the courts (see no. 7 below).

6) If the investigator opts to dismiss a complaint or force a complainant into an unsatisfactory settlement, the complainant receives a letter stating that there was "insufficient evidence" (with regard to the entire charge or with regard to the components of the charge not remedied by the Labor Department's involuntary settlement agreement). This letter does not provide the complainant with the specific information necessary to make an appeal. No justifications - legal, factual, or logical - are spelled out as the

rationale for the dismissal. The company position, defense, and charges are still not fully disclosed to the complainant. (The complainant is not given a "bill of particulars".) Thus, the complainant is forced to appeal in the dark and is unable to systematically, intelligently, and thoroughly address the reasons why the investigator's action should be overruled.

7) If the complainant's appeal is denied (remember that there has been no hearing at any stage), he has no further recourse. There is, at present, no established private right of action for violation of Section 11(c). The complainant may not appeal the Labor Department action to the courts. At such time, when the information is no longer of any practical value, the U.S. Department of Labor will release to the complainant his case file under the Freedom of Information Act. This information (employer allegations and charges against the complainant, etc.) will have been denied the complainant until he has exhausted all his legal remedies. The Solicitor of Labor denies the complainant access to his file until after his appeal has been denied and his case has been closed; the Solicitor does this through a misapplication of Exemption 7. This modus operandi also denies the complainant - until it is too late - the opportunity to directly discover inadequate investigation or improper investigative actions.

The denial to a complainant of access to his own case file under the Freedom of Information Act is the linchpin in the U.S. Department of Labor's systematic and deliberate denial of due process to the complainant.

I have outlined above the way in which the U.S. Department of Labor's procedures are designed to deny due process to 11(c) complainants at every step of the adjudicative process. Any complainant in an 11(c) case faces a stacked deck. No matter how good his case, an 11(c) complainant is unlikely to obtain an adequate or just settlement under the auspices of the U.S. Department of Labor. The secrecy, unconstitutional denial of due process, and industry-indentured practices of the Department of Labor are loathsome to the principles of a free society and must be ended immediately.

The most crucial recommendation I have made is for OSHA to be required to conduct hearings (Recommendation II). There is no reason why it cannot or should not do so. The fact is that the Labor Department is perfectly capable of conducting hearings related to employment discrimination against "whisle blowers" under other statutes. (See Science, Vol. 207, 7 March 1980, p 1057 for an example of a Labor Department hearing for a whistle blower protected under provisions of the Energy Reorganization Act of 1974.)

With respect to Recommendation VI, the rationale for the 30 day time limit for filing a complaint is that the Secretary of Labor should be allowed to decline to entertain complaints in which the evidence has gone stale. However, OSHA's own actions contribute to staleness of evidence in 11(c) complaints. OSHA makes no effort to meet the congressionally mandated 90 day time limit from receipt of complaint to notifying the complainant of the Secretary's determination. In my case, 4 months elapsed from my filing a complaint until I was first visited by an investigator. And although 13 1/2 months have expired since my initial filing and 6 months have passed since my termination, I have not yet received a determination from the Secretary of Labor. The 30 day time limit for filing is just one of many ways in which OSHA discriminates against complainants to the benefit of discriminating employers. The NLRB has a 6 month filing time limit. There is no reason why OSHA should not also be required to have a 6 month filing limit.

And this deadline should extend from the time at which the complainant first learns of a violation. This would protect against surreptitious employer actions such as blacklisting, placing improper documents into personnel files, etc.

Another grave problem in the Labor Department's administration of Section 11(c) relates to the antagonism which has existed between OSHA and the Solicitor of Labor. The Solicitor's office has been reluctant to litigate 11(c) cases and may even refuse to litigate merit cases recommended by OSHA for litigation. The Solicitor's office is well known for foot dragging and procrastination on 11(c) cases. The Solicitor must be required to pursue timely litigation of merit cases when the employer refuses to settle.

Additional Comment

The proposed S.2153 provides an employer loophole in the guise of voluntary employer cooperation through the use of company safety committees. Such committees may be used as a front by an employer to place the employer's operation in an unjustifiably favorable light. In my case, the employer had a safety committee. The chairman of the safety committee reported directly to (was under the direct supervision of) the management official who set in motion the employer's 11(c) violations. Furthermore, the safety committee was used as an instrument to whitewash the company with respect to the unhealthful working conditions in question, and to attempt to discredit me and the validity of my complaint.

Appendix 1

BNA OCCUPATIONAL SAFETY & HEALTH REPORTER

Sept. 14, 1978

Discrimination

CRITICISMS LEVELED AT OSHA EFFORT TO PROTECT WORKERS FROM DISCRIMINATION

AFL-CIO delegates to a safety and health conference were told September 12 that Federal Government efforts to protect employees from discriminatory actions by employers were inadequate and deserved greater involvement by local union officials.

"Anti-Discrimination and Other Workers' Rights under OSHA" was one of several workshops attended by delegates to the first AFL-CIO National Conference on Occupational Safety and Health, which began September 11 in Washington, D.C. (See related articles in this issue.)

"From the complaints I have gotten, the (antidiscrimination) program has got to be changed. It's not working," asserted Edward F. Eagan, a workshop speaker and labor liaison staff member of the Occupational Safety and Health Administration in Boston.

Eagan complained that supervision of antidiscrimination investigators of OSHA had been shifted to the national office from area directors and regional administrators. He said many investigators lacked basic knowledge about health hazard recognition due to insufficient training.

Eagan charged that investigations were slow and results often unsatisfactory.

Zoltan Bagdy, who heads the office which investigates complaints under Section 11(c) of the Occupational Safety and Health Act, conceded that cases were not handled as quickly as he would like and that staffing problems had been experienced. The case-load is steadily increasing, Bagdy added.

Bagdy reported there were 59 persons assigned to 11(c), including 51 investigators in the field. Later, he supplied figures which showed that for fiscal 1978 (through August 25) a total of 218 cases had been settled. Cases deemed inappropriate for investigation numbered 902, withdrawn 537, withdrawn and informally settled 18, dismissed for lack of merit 463, and litigated 21.

Of the cases litigated, complainants obtained remedy through the courts in 13 instances, six cases were dismissed on the merits, and two cases were dismissed for procedural reasons. Bagdy added that 333 cases to date have been forwarded by his office to the Solicitor of Labor with "recommended merit."

Courts Are Slow

Bagdy commented that filing suit in a U.S. district court — the only course of action if a complaint can't be settled — is a slow process. He said 11(c) efforts also are hampered in that the language of the statute does not specifically protect employees who refuse to work because they fear a job poses an imminent threat to health or safety. The Labor Department has appealed a case to the Supreme Court to try to establish the right to refuse to work.

Jerry Balter, an attorney working for the Philadelphia Area Project on Occupational Safety and Health (PHILAPOSH), urged employees to file complaints both with OSHA and with the National Labor Relations Board, charging unfair labor practices against the employer.

Badgy promised another PHILAPOSH representative during a question-and-answer session that OSHA expects to release an informational booklet on employee rights regarding discriminatory practices in about two months. He also predicted that some of the administrative changes in the 11(c) program recommended in a petition to OSHA from PHILAPOSH would be put into effect in about three months. *

OSHA is at work preparing an educational film on protection of workers under 11(c), which could be ready in about one year, Bagdy added.

William M. Murphy, OSHA acting area director in Cincinnati, urged the audience not to wait for the outcome of union grievance procedures in discrimination cases. By waiting, an employee can miss the 30-day deadline for filing a complaint with OSHA. Murphy explained that the 30-day limit begins at the time the alleged discrimination becomes known to the worker.

Murphy warned that if an 11(c) investigator or other OSHA staff person asks a worker who has complained to withdraw that complaint voluntarily, the worker gives up a chance to appeal. He advised waiting and then appealing if the initial OSHA investigator rules there is no merit in the complaint and the worker still disagrees.

Finally, the area director and former 11(c) investigator encouraged local union officials to become informed about and involved in the antidiscrimination program so they can assist local members.

Murphy urged them to monitor OSHA's handling of complaints to make sure they are taken care of efficiently. "Let us know you are interested in these cases," he said.

Appendix 2

Job Protection for "Whistle Blowers" Being Tested

The state of Missouri is challenging the right of a health physicist to seek federal protection from loss of his job at a state cancer hospital where he "blew the whistle" on a rules violation involving use of radioactive material.

Now pending in the U.S. Eighth Circuit Court of Appeals, the case involves Clifford W. Richter, whose job as health physicist at Ellis Fischel State Cancer Hospital in Columbia, Missouri, was abolished in late 1978 some 8 months after the whistle-blowing episode occurred.

In late 1977, some seeds of iridium-192 which had been implanted in a cancer patient were overlooked and left in the patient's body when she was discharged. When the mistake was discovered the next March, Richter, knowing that for the iridium not to have been removed before the patient left the hospital was contrary to federal law, immediately reported the violation to the Nuclear Regulatory Commission (NRC).

Richter had had reason to believe that he was in good standing. His performance ratings had been excellent, and, only 3 months before the rules violation was reported, the hospital administrator had recommended him for a $10,000 raise. But he was soon admonished by the administrator for making the report to the NRC without first clearing it with him and the hospital staff. In late 1978, Richter, who meanwhile had informed the NRC that another iridium seed was missing (it was later found on the roof of the hospital), was notified that his job as chief physicist was being abolished.

Richter's report had led both the NRC and a committee of the Missouri State Senate to investigate the initial incident. Serious deficiencies in the hospital's handling of radioactive material were brought to light. Also, survivors of the cancer patient—the hospital maintains the overlooked iridium seeds in no way contributed to her death—have filed a $10.5 million malpractice suit against the hospital.

Under the Energy Reorganization Act of 1974, institutions licensed by the NRC to use radioactive materials for cancer therapy or other purposes may not fire an employee for reporting rules violations. Accordingly, Richter sought redress from the Department of Labor, and, after an investigation and hearing, an order was issued last August for the hospital to reinstate him with back pay.

Missouri is now challenging this order. It maintains that Richter's job was eliminated as part of a hospital staff reorganization that was unrelated to the furor caused by his report to the NRC. Beyond that, the state asserts that the Eleventh Amendment of the Constitution gives its institutions a shield of sovereign immunity from actions such as the one taken against the hospital by the Labor Department. The Court of Appeals will begin hearing the case on 13 March.

Conservation League Gives Brown Top Rating

The League of Conservation Voters gives its highest rating to Governor Jerry Brown of California, but all three Democratic presidential contenders are preferred to any of the Republicans who are running.

The league, a nonpartisan organization that has endorsed Republicans as well as Democrats in past congressional races, gave its assessment of the presidential candidates at a Washington news conference on 21 February. The assessment represented the consensus view of a league steering committee drawn largely from major national environmental groups such as the Sierra Club, the National Audubon Society, the National Wildlife Federation, and the Environmental Defense Fund.

Although the league was not speaking for these groups, its judgments on the candidates may represent the best available reading of how environmentalists are sizing up the candidates, at least at this early stage in the presidential race. Governor Brown was cited for "excellent appointments and [policy] initiatives, strong leadership on energy and pollution control, and good follow through." The league indicated that for those environmentalists who turn toward President Carter and Senator Kennedy in the belief that Brown cannot win the nomination, choosing between them will not be easy.

It credited President Carter with "many good appointments"—his appointment of the strongly pronuclear James Schlesinger as secretary of energy was cited as a conspicuous exception—and with a number of "enlightened policies," as in his proposals to preserve much of the Alaskan wilderness and abolish the water projects pork barrel. But the Carter Administration's record in implementing laws such as the Clean Air Act, the Toxic Substances Control Act, the Endangered Species Act, and the Outer Continental Shelf Lands Act was characterized as spotty.

Moreover, the league deplored the "deep conflict between the President and environmentalists on energy, starting with the Administration's early support for nuclear power and culminating in the President's disastrous initiatives on synthetic fuels and the Energy Mobilization Board."

The league said that Senator Kennedy has an outstanding voting record on environmental issues. But it noted that he has not been a leader nor been tested under pressure on these issues.

Among the major Republican contenders, the league gave Representative John B. Anderson of Illinois and Senator Howard Baker of Tennessee the best overall ratings, and, of the two, Brent Blackwelder, the league's president, said Anderson was to be preferred. The league credited Anderson with playing a "crucial role" in House passage of the Alaska lands bill last year, but it criticized him as the congressman whom some regard as "the most effective and skillful proponent of nuclear power in the House." Baker was credited with excellent leadership on pollution control issues, but was given bad marks both for his record as a nuclear proponent and as a supporter of the Tellico Dam.

George Bush, the Republican front-runner going into the New Hampshire primary, was found to have "poor campaign positions" on issues having to do with energy and environmental regulation, although as a Texas congressman in the late 1960's he was said to have "courageously stopped" a Buffalo Bayou channelization project in his home district in Houston. Ronald Reagan was put down as "generally unsympathetic to environmental concerns" and John Connally was held to be "openly hostile."

—Luther J. Carter

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1302 - 18th Street, N.W. • Washington, D.C. 20036 • 202 466-6040

Founded By:
Philip A. Hart
1912—1976

May 9, 1980

Senator Harrison A. Williams, Jr., Chairman
Senate Committee on Labor and Human Resources
4230 Dirksen Senate Office Building
U.S. Senate
Washington, D. C. 20510

Attention: Michael Goldberg

Dear Senator Williams:

Enclosed is a statement on S.2153, S.1486, and S.1572 for inclusion into the hearing record on that legislation.

The statement, endorsed by 25 national and local organizations, expresses opposition to all three bills as unwisely exempting various classes of employers from all or part of the Act. We strongly urge this committee to cease consideration of this legislation, and further to reopen oversight hearings so that a more complete view of OSHA can be developed, one including the views of organized and unorganized labor, public health, environmental and other public interest viewpoints.

I would appreciate acknowledgement of the receipt of this testimony and its inclusion in the hearing record.

Sincerely yours,

Brett A. Hill

Brett Hill
Special Projects Coordinator

BH:mjb
cc: Members of the Senate Committee on Labor
and Human Resources
Enclosure

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1302 - 18th Street, N.W. • Washington, D.C. 20036 • 202 466-6040

Founded By:
Philip A. Hart
1912—1976

Testimony of the

Urban Environment Conference
Citizens Energy Project
Clergy and Laity Concerned
Coalition for the Reproductive Rights of Workers (CRROW)
Community Health Advocacy Network (Pittsburgh, PA)
Consumer Federation of America
Delaware Valley Toxics Coalition
Ecology Center of Louisiana
Environmental Action
Environmental Action Foundation
Environmental Defense Fund
Environmentalists for Full Employment
Friends of the Earth
Institute for Local Self-Reliance
Migrant Legal Action Program
National Association of Community Health Centers
National Center for Jobs and Justice
National Council of La Raza
National Urban League
Native American Rights Fund
Natural Resources Defense Council
Progressive Alliance
Sierra Club
Conservation Foundation
Ohio Environmental Council

Before the

Senate Committee on Labor and Human Resources

on

S.2153, S.1486, S.1572

May 9, 1980

Introduction

We protest the fact that we were not allowed to present this testimony in person before the committee; the decision to limit testimony to labor, management, and government, while acknowledging the primary roles played by these interests, ignores the broader public policy aspects of the Occupational Safety and Health Act of 1970 (the Act), the impacts of the Act on people not represented by the above three interests e.g., unorganized workers, and public and environmental health. We also note the lack of field hearings on the bill, which greatly restricts the ability of low income individuals and organizations to participate in the consideration of this legislation.

The public and environmental health interest in the Act is a large one. OSHA represents a strong link in a chain of legislation and administrative programs created to control hazardous substances and conditions - programs like the Environmental Protection Agency's regulation of human and environmental exposure to air and water pollution, to hazardous substances in landfills, and toxic chemicals in commerce; like the Consumer Products Safety Commission actions on unsafe toys and consumer goods; like the Food and Drug Administration regulation to prevent public contact with carcinogens and other toxins through food and drugs; like National Institutes of Health research and education programs for the prevention of needless tragedy through exposure to environmental pollutants; etc. It is clear, for example, that research conducted by studying occupational exposures in many cases allows us a first glance at what larger public exposures might become; most of the known human carcinogens were first identified in the working population. The flurry of activity and millions of dollars now proposed for the removal of asbestos insulation from schools and other public buildings and even hair dryers is a direct result of asbestos exposure in workers.

Similarly, OSHA is the first regulatory agency to tackle head-on the incredibly complex and contentious issue of carcinogen regulation for large numbers of citizens and for large numbers of substances. This effort has spawned a similar effort by the Environmental Protection Agency on airborne carcinogens. It is likely to lead to similar efforts by other agencies.

Understandably, therefore, there has always been public health and environmental support for the goals of the Occupational Safety and Health Act. The American Public Health Association has steadfastly supported the goal of a safe and healthful workplace even before the passage of the 1970 Act; the Sierra Club supported the Act in 1970, endorsed the first major strike over health and safety by the Oil, Chemical and Atomic Workers in 1973, and is at this time submitting testimony in opposition to S.2153. The Urban Environment Conference, on behalf of a score of national non-labor organizations, has helped defend the agency against debilitating legislative attacks since 1975. The other organizations endorsing this statement only add to the truly broad support this legislation enjoys.

Much of the interest in the Act lies in its preventive nature, the fact that inspections, first-instance sanctions, and mandatory safety and health standards were all written into the original Act as measures to try to prevent both major tragedies that took hundreds of lives as in the Gauley Bridge disaster in the 1930's or the more recent deaths in the scaffold collapse at Willow Island, West Virginia in 1978 and the tragedies that take place on a smaller scale each and every day. This preventive commitment makes the Act a major piece of public health legislation, one that takes that sorely needed step from good intentions to regulatory discipline.

In sum, the interest and activity engendered by Congressional recognition, in the 1970 Act, of the existence and magnitude of the job safety and health problem are truly phenomenal. By one measure, that of employee requested inspections, the level of interest has climbed from 6600 requests in 1973 to 20,000 requests in 1979.

Hundreds of educational sessions are conducted annually, and the number climbs yearly. This activity must not be chilled through the reining in of the vital activities of the Occupational Safety and Health Administration.

S. 2153

First and foremost, the issue presented by S. 2153 is exemption for certain employers from certain provisions of the Act. We feel that exemptions as a policy tool are ill-advised, for they remove employers from potential enforcement under the Act that may serve to keep employers in compliance. Even in those cases in which employers are for the most part in compliance, the machinery for rapid administrative reaction to changing circumstances should not be removed. Indeed, as noted below, exemptions of small businesses from the Act have specifically been recommended against by the House Committee on Small Business.

To make an analogy: why do we not exempt from food sanitation inspections food establishments that have a year's record of cleanliness? What diner would want to eat in such an exempted facility? We do not do so because we feel that public health authorities should maintain a presence among restaurant owners to ensure that they do remain in compliance with the law. So too with OSHA regulation. Indeed, if we were to "improve" restaurant sanitation as S. 2153 seeks to "improve" OSHA, some number of restaurant patrons would have to sicken or die before the establishments were fully inspected again.

A second major problem with the bill as written concerns the status afforded employee rights. By inserting the requirement that OSHA first attempt to receive "satisfactory assurances" that the hazard complained about has been rectified, the worker loses his or her right to a surprise and (hopefully) prompt investigation. At best, under S. 2153's proposal, the worker can anticipate additional delay in OSHA's response to the complaint. At worst, a weak agency interpretation of or employer litigation over what constitutes a "satisfactory assurance" would effectively make impotent workers' rights to complain; S. 2153 effectively imposes a second-class status on some workers in exempted firms. In those circumstances in which no true hazard exists, this worker-initiated complaint restriction perhaps would not make a great difference; but in cases of agency conservatism, or employer intransigence, or in which a worker is reporting an unknown but imminently dangerous hazard, this effect could be disastrous.

Contrary to the assurances of the supporters of S. 2153, the legislation would restrict OSHA's ability to conduct health activity, perhaps greatly so. First of all, exempting 90% of all workplaces from general schedule safety inspections voids those instances in which a safety inspector is the first to notice a health hazard. Indeed, about 12% of general schedule safety inspections refer health hazards to health inspectors, and certain specific hazards, e.g. asbestos, the proportion can be even higher.

Second, the increased paperwork burdens posed by the affidavit system will serve to reduce OSHA's efforts in all areas, including health inspections and the promulgation of new health standards. Finally, workers are tragically uneducated about health hazards in the workplace; S. 2153's restriction on "wall-to-wall" inspections will prevent inspectors from detecting other, potentially more serious health hazards than the one(s) alleged in the worker complaint.

Another major problem with the legislation is the affidavit system. Because the state workers' compensation agencies will in most cases (at least for the first years) be unable to provide the data called for by S. 2153, the self-policing affidavit system will be the more significant basis for exemption. OSHA will be faced with a potential four million affidavits, each requiring some form of processing, that will drain countless person-hours from the real job of creating safe and healthful workplaces. If OSHA were to verify these affidavits, countless more person-hours and possibly employer and employee interviews would be required. And, lest this committee forget, the failure of weak state regulation and employer voluntarism were the primary reason for the passage of the 1970 Act.

Most, perhaps all of S. 2153's criticisms of OSHA - the need for improved targeting, the need for better screening of worker complaints, increased reliance of labor-management safety and health committees - can be handled administratively without resort to the drastic measure of employer exemption from the Act. This committee should take the posture of cooperation with OSHA to help it improve what is by nature a very complex undertaking - the elimination of hazards on the job, and the protection of a series of essential worker rights - rather than in haste take up the banners of employers seeking exemption from the Act and champion their cause over that of the millions of workers who daily face threats to life and limb.

S. 1486

This bill seeks to exempt from the Act employers of 10 or fewer employees falling into 3-digit SIC codes that have an injury/illness rate of 7 or less per hundred full-time employees (as calculated in the annual BLS survey of employer injury and illness rates). This proposal suffers from a number of serious problems:

- the exemption of employers, like the proposal of S. 2153, removes them from the possibility of inspection, probably the most effective tool OSHA has to improve employee safety and health;
- exemption by industry hides unsafe workplaces within otherwise "safe" industries;
- the yearly redetermination of exemption would cause serious confusion for all parties; and
- exemption would strip workers in exempted workplaces of many hard-won rights, including the right to a safe and healthful workplace, to call for an OSHA inspection, and the right not to be discriminated against for taking action to improve the work environment.

This committee should note that its colleagues in the House Committee on Small Business in 1977 recommended against exemption of small businesses from the Occupational Safety and Health Act.

S. 1572

This proposal would exempt from the Occupational Safety and Health Act all small farms (i.e., employing fewer than 11 employees) that do not maintain a temporary labor camp. The ostensible purpose of the bill is to remove OSHA regulation from the operation of family farms. OSHA has, however, long exempted farms employing only relatives of the employer from inspections; OSHA estimates that well over 90% of farms would be exempted by this proposal, and certainly all of these cannot be "family" operations. Agriculture is, however, the third most hazardous industry in the United States, and Congress cannot afford to turn its back on the millions who labor in the face of such hazards as pesticides, farm equipment, extremes of heat and cold, and exposure to many biological agents. Besides the extreme hazardousness of the industry in question, S. 1572 should be opposed, like S. 2153 and S. 1486, for the simple reason that it exempts employers, and therefore removes them from all the incentives of the Act to eliminate workplace hazards.

Conclusion

In sum, we reiterate our opposition to exemptions from the Act because exemption removes employers from the incentive to achieve and/or maintain a hazard-free workplace. We express our specific opposition to S. 2153, S. 1486, and S. 1572 because they embody exemptions from the Act and because they would weaken the already inadequate authority and resources of the Occupational Safety and Health Administration. We further urge this Committee to reopen oversight hearings on the Act so that a more complete hearing record can be developed, one including the views of unorganized labor, public health, environmental, and other public interest viewpoints.

TESTIMONY OF THE AMERICAN MEDICAL STUDENT ASSOCIATION
SUBMITTED TO THE
SENATE LABOR AND HUMAN RESOURCES COMMITTEE
HEARINGS ON THE OCCUPATIONAL
SAFETY & HEALTH IMPROVEMENTS ACT

ROCIO HUET
President

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MARK SMITH
Occupational and Enviornmental Health

HOWARD GRANT
Legislative Affairs

April 30, 1980

TESTIMONY OF THE AMERICAN MEDICAL STUDENT ASSOCIATION
SUBMITTED TO THE
SENATE LABOR AND HUMAN RESOURCES COMMITTEE
HEARINGS ON THE OCCUPATIONAL
SAFETY & HEALTH IMPROVEMENTS ACT

We are medical students representing the American Medical Student Association (AMSA). We would like to thank you for the opportunity to present the viewpoint of our membership. AMSA has over 20,000 members at 139 medical schools in this country. AMSA is a totally independent organization and we are proud of our record in improving medical education and health care. As future physicians, we are deeply concerned, not only about problems affecting us directly, but in issues affecting the health of any American.

We believe that the quality of the environment and of the workplace has an important bearing on our health as a nation. We believe that "occupational disease is a threat to public health and welfare, and that occupational hazards contribute to the morbidity and mortality of a large segment of the population of the United States; it is the right of employed persons to have a safe and healthy place of employment."[1]

The scope of the problem is well known. In 1977, the National Safety Council estimated that work accidents resulted in 13,000 deaths and 2.3 million disabling injuries; 80,000 of these were permanently disabling. Perhaps more disturbing are recent studies which estimate that 20 to 30 per cent of all cases of cancer may be occupationally related. (Cancer strikes one in four Americans, according to the American Cancer Society.) In addition, there is a growing body of evidence pointing to an occupational etiology for many cases of cardiovascular and pulmonary disease, and other serious, chronic disorders. There are at least 100,000 work-related deaths a year; there may be many more.

We in AMSA believe that the best approach to the occupational health problem is a preventive one. The Occupational Safety and Health Improvements Act (S. 2153) would have the effect of limiting the Occupational Safety and Health Administration's safety inspections to plants where serious accidents and/or deaths will have already occurred; it would effectively exclude 90% of the nation's workplaces from surprise safety inspections. This would spell the death of OSHA's preventive approach to occupational health. Spot inspections, like physicial exams, are meant to spot sources of problems before accidents happen. As is the case in other branches of medicine (especially those dealing with chronic or disabling illnesses), prevention is both cheaper and often easier than the treatment of the disease.

S. 2153's co-sponsors claim that exempting workplaces with average or above average safety records, according to the number of worker's compensation claims filed the previous year, would make employers more safety conscious. But these legislators overlook the fact the worker's compensation data often do not accurately reflect health and safety conditions in a workplace. One reason for the rise in number of compensation claims filed is that workers are beginning to become more aware of their rights to compensation -- sometimes with their employer's help. Allis Chalmers in Milwaukee, for example, informs its workers that they are entitled to compensation for hearing loss upon their retirement. (Hearing loss afflicts almost 100% of the workers in certain industries.) They are reportedly the only company in that city to do so. S. 2153 would penalize a company like Allis Chalmers and would favor companies that managed to keep injured employees either: 1) uninformed of their rights to compensation; or, 2) at the plant, as "walking wounded," rather than have them go home and report an accident.

Presently, OSHA inspectors can go right into a plant in response to an employee's complaint (somtimes after obtaining a warrant). Under S. 2153, an exempt company would only have to inform OSHA that a reported hazard had been corrected to prevent an inspection, even after an employee complaint. This provision would undercut an important aspect of the Occupational Safety and Health Act -- the right of an employee to inform OSHA of a safety violation, and to receive a prompt response. In effect, this provision would diminish the incentive for workers to educate themselves and take action on conditions affecting their own health if the plant was not truly responsive to their concerns. Patient awareness and patient responsibility is a leading concern of AMSA and of most physicians today.

To further debilitate OSHA, no penalties could be issued to an exempt employer with an advisory safety committee and a safety consultation program; and even for the small percentage of workplaces not exempt from OSHA's safety program, fines, even for "serious citations," could not exceed $700.

Futhermore, though S. 2153 is aimed only at OSHA's safety program, "there is no sharp dividing line between health hazards and safety hazards," to cite Dr. Henry Howe, Associate Director of the AMA's Department of Environmental, Public, and Occupational Health. "The two are inextricably intertwined."[3] Many chemicals which cause serious burns also cause kidney, liver, bladder, and neurological disease; particles and dusts which cause accidents and injuries also cause obstructive lung disease and cancer. In addition, S. 2153 represents a dangerous trend, which began with exemptions for "safe" small business and is continuing with exemptions for any small businesses and most farms. If safety exemptions for virtually any company is next, can health exemptions be far behind?

With an average annual budget of only one hundred million dollars ($1.60 per worker), OSHA has helped to bring about a dramatic fall in the number of deaths in the workplace (26% since 1968), and a less dramatic but still impressive drop in the injury and illness rate (10%). Perhaps more important is evidence that among target industries, on which OSHA has concentrated (construction and machinery, for example), injury and illness rates have fallen 18 to 19%.[3] In addition to this, in 1978, OSHA awarded 8.8 million dollars - under its New Directions program - to business, education, and labor organizations - for the purposes of education in occupational health. These efforts could have a significant effect on the general level of health awareness in this county.

Admittedly, in its early years, OSHA sometimes concentrated on merely technical violations of the health and safety code, but under its present leadership, this has changed. 90 to 95% of OSHA's resources are now targeted towards inspections of the nation's most hazardous workplaces (as determined from Bureau of Labor Statistics figures).[4] The important fact is that though OSHA only has the resources to inspect a small percentage of workplaces, it is allowed, under law, to inspect any workplace. To alleviate the problem of OSHA's lack of resources restricting it to a small percentage of employers, it must be strengthened, not weakened. And just as you do not strengthen a police force by limiting its jurisdiction to only the most dangerous neighborhood in a large city, you can not limit OSHA's jurisdiction to one small segment of the nation's employers.

In conclusion, AMSA believes occupational disease continues to be a significant health problem; but the Occupational Safety and Health Administration has made some important steps towards the solution of the problem. Though OSHA could be improved, and should be strengthened, the so-called Occupational Safety and Health Improvements Act (S. 2153) is in direct opposition to both the spirit and the substance of the Occupational Safety and Health Act. Therefore, S. 2153 must be opposed by health professionals, legislators, and anyone else concerned with the health of the American people.

AMSA TESTIMONY - FOOTNOTES

[1] AMSA Preamble, Purposes and Principles, 1979, Principles Regarding Quality of Life and the Environment, Principle 15.

[2] "Organization and Operation of an Occupational Health Program," revised ed., a publication of the Occupational Health Institute, Inc.

[3] data supplied by the Urban Environment Conference, Inc.

[4] Ibid.

TESTIMONY OF
CURT WIBLE
FOR
LEGISLATIVE HEARINGS
ON THE
OSHA IMPROVEMENTS ACT OF 1980
BEFORE THE
U.S. SENATE LABOR AND HUMAN
RESOURCES COMMITTEE
APRIL 15TH, 16TH,
17TH 1980

CURT WIBLE IS CHAIRPERSON OF PHILAPOSH, THE PHILA. AREA PROJECT ON OCCUPATIONAL SAFETY AND HEALTH, A COALITION OF 63 LOCAL UNIONS. MR. WIBLE'S TESTIMONY IS ON BEHALF OF PHILAPOSH

TABLE OF CONTENTS

Protest..0

Opening Statement..1

What the Bill would do.....................................3

Summary..9

Appendix 10

PROTEST

The Philadelphia Area Project on Occupational Safety and Health submits this testimony under protest for the following reasons: First, the short notice given to interested parties; Second, the total exclusion of "COSH"* groups from the oral testimony aspect of the legislative hearings process. This total exclusion of at least some segments of the labor movement is indicative of the cavalier approach of the Committee on Labor and Human Resources to accumulating testimony from those most severely affected by the outcome of these "hearings."

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*COSH groups are coalitions on occupational safety and health made up of local unions and health and legal professionals. Philaposh is a coalition of 63 local unions in the Philadelphia area.

OPENING STATEMENT

S 2153 is the most serious attack on OSHA since its passage in 1970. Any attack on OSHA obviously threatens the health and safety of the American worker. We feel that the OSHA Improvements Act of 1980 is the worst misnomer ever devised. The only thing this act will improve is the business climate for the funeral industry. There is not one line in the bill that we can begin to agree with; there is no common ground or compromise that we can possibly entertain. The entire bill must be eliminated. S 2153 will cost thousands of workers their health and their lives due to totally preventable injuries suffered because of lack of OSHA protection. OSHA inpsections and citations force the company to correct potential hazards before someone is injured or killed. Yet S2153 proposes to inspect most workplaces after serious injury or death. That's too late!

Every word of complaint from OSHA's enemies cries out for a stronger, better funded OSHA. Worker testimony equally states the same case. S2153 is based almost totally on 1974 conceptions of OSHA. Under Dr. Eula Bingham's direction, the agency has completely turned around and now addresses practically every complaint voiced by OSHA critics. Nearly a thousand so-called "mickey mouse" or "nit pick" regs have been thrown out. Serious, willful and repeat violations have risen dramatically. More regulations on hazardous substances than ever before in the history of OSHA have been promulgated under Dr. Bingham's leadership. Some 200,000 hours of consultation or informal compliance assistance have been provided by OSHA on such matters as protective guarding on punch presses and press brakes.

On May 18th, 1979, former Philaposh Chairperson, Frank McGarry's testimony at OSHA oversight hearings in Philadelphia revealed that over 80 cases were sitting in the Philadelphia office of OSHA waiting for letters to be sent to employers who had complaints filed against them that were of a health, safety, serious and non-serious nature. Again, OSHA was already administratively moving towards resolution of S2153 criticisms. (See Appendix A)

S 2153 contains such vague phrases as "satisfactory assurances" and "adequate response" in reference to companies' avoidance of inspections. What do such phrases mean? Who will define them? What is the criteria for ascertaining the truth or falsehood of such company claims that will aid them in avoiding OSHA on-site scrutiny? S2153 offers no solution to the mounting injuries suffered by those of us who work for employers whose solid resistance to OSHA compliance is at the root of what causes workplace injuries.

The shortcomings that the bill is attempting to address have already been corrected administratively. Some of these points as well as other points not as yet mentioned will be detailed in the pages that follow.

SOME OF WHAT THE BILL WOULD DO

Section 4A (a)(1)

The Bill admittedly would exempt 90% of businesses regardless of size from OSHA safety inspections.

The claim is that this will focus OSHA's resources on the 10% of employers who are "bad guys." The reality is that OSHA has administratively focused its resources on "worst first" inspections thereby eliminating the need for legislation on this, the key argument of S2153. (See Appendix B.) OSHA's efficiency in this area is clearly demonstrated by the reduction in numbers of inspections and the corresponding dramatic increase in serious willful and repeat violations uncovered.

Under S2153, exempted workplaces could only be inspected after OSHA notified them of a complaint, thereby giving advance notice of the inspection. This violates the spirit of the OSH Act. Surprise inspection is the key to seeing the workplace as it really is.

S2153 further weakens the OSH Act by saying that even after the company is notified of complaints, the inspection could be stopped by the company's simply providing "satisfactory assurances" and that "appropriate action" has been taken. We can, however, get an inspection of our workplace if we are dead or, more than one of us is hospitalized. Thanks, OSHA Improvement Act of 1980!

We fail to see the logic in this part of the bill. Do we focus the FBI's resources on only 10% of organized crime thereby allowing exemptions for the other 90%? Do we exempt 90% of DC 10's from inspection to aid safer flights?

Safety inspections often trigger health inspections.

OSHA safety inspectors receive "cross over" training which aids them in recognizing health hazards while on safety inspections. Limiting safety inspections as S2153 does will have an impact on health hazard recognition and correction. The claims that the bill only talks about safety and not about health is patently false.

In many cases, one cannot differentiate between safety and health. Further, the bill limits an inspection to the specific violation in the complaint, thereby placing blinders on the inspector. This will benefit workers? Wouldn't it be more efficient to have a complete OSHA inspection on the first visit instead of a long series of visits to each separate and distinct operation in a plant?

Section 4A (b)

S 2153 exempts companies with "good safety records" from OSHA safety inspections. A good safety record will be based on data from state workers compensation records. Most states have a three-day waiting period before compensation can be claimed. Almost half the states have a seven-day waiting period before compensation. "From 30 to 50% of all lost time injuries are not subject to reporting." [1] As a paper commissioned by the Federal Task Force on Workers' Compensation points out: "The major problem...has not been the lack of uniform data, but...the lack of much meaningful data at all.... Some states have either no penalties for reporting violations or a penalty...which is so harsh as to virtually guarantee that it will never be imposed.... As a result even the most basic information such as the number of accidents, is not reliable." [2]

Section 4A (c)(1)

S 2153 would exempt companies with less than 20 reported accidents per 1000 workers and no deaths in the previous year from most OSHA safety inspections. This is the most powerful incentive for not reporting accidents. This section also provides that most workplaces would be inspected only after a worker is injured or killed. Obviously that is too late.

Under the proposed bill, a plant that experienced explosions in 1975, 1977 and 1979, each of them costing worker lives, would likely be exempted in 1981, if no deaths occurred in 1980. This represents a fatal flaw in the bill's logic and represents "shooting dice" with workers' lives.

1. Ginnold, Richard. "Targeting--A Way for OSHA to be More Effective." Labor Occupational Health Program, University of California, Berkeley. Feb., 1980. Page 1.
2. Ibid., page 1.

Another flaw in this particular section of the bill is pointed out in the following example. "Instances of slings and hoists breaking and slipping and allowing heavy parts to come close to striking employees would indicate that the employer was not regularly inspecting the structural integrity of the equipment. Of course these "near misses" will not show up in workers' compensation reports. (emphasis added) A routine safety inspection would identify this hazard before it had continued long enough to result in a serious injury or fatality." (See appendix C page 4)

Section 4A (a)(1)

S 2153 would take away a worker's statutory right to an OSHA safety inspection in response to a valid formal complaint of a safety violation in most cases. If your workplace is exempt and you file an OSHA complaint, you would probably not get an inspection. OSHA would just ask the company if the violation had been corrected. Even worse, OSHA would be forced to accept "satisfactory assurances" and "adequate responses" from employers. The potential exists , due to these undefined phrases, for a mountain of red tape, paper work and litigation. So much of OSHA's time will be bogged down in this manner that it is doubtful if any workplaces will ever really get inspected.

Section 4A (a)(3)

This section prohibits comprehensive inspections and severly limits the scope of an OSHA safety inspection. When OSHA inspects after a death or injury, it can only inspect the direct cause of the accident. Again this puts blinders on inspectors and develops a "see no evil" approach to safety inspections. Realistically, an exempt plant, with a safety committee and consultation service, could experience the following scenario.

Joint committeemeets monthly and debates the existence of a safety hazard such as a machine safety problem that could cause an amputation. Four consecutive monthly meetings fail to resolve the problem. Workers on the committee file a complaint with OSHA. Weeks or months later, OSHA sends a letter to the company informing them of the complaint. Weeks later the company responds with a letter giving "reasonable assurance" that no problem exists, or that they intend correction.

Roughly six months have passed with no real correction of the problem. But let's say OSHA doesn't accept the "reasonable assurance" of the company. It is probable that the company will try to block the inspection through the OSHA Review Commission with more months of delay, or block inspection by exercising company rights under the Supreme Court's Barlow decision, demanding that OSHA obtain a warrant (more possible months of delay). A pattern of this kind of company recalcitrance will likely result in thousands of amputations. We can ill afford to play so fast and loose with workers' bodies.

Does this example, which is "near fetched" if anything, speak to a more efficient OSHA, or an improved OSHA? Where does the worker gain anything under these new rules?

Section 4A (a) (4)

S 2153 requires that certain worksites be subdivided into multiple workplaces for determining exemption from safety inspections.

Some parts of a plant would be exempt while others would not. Numerous inspections could result at a plantsite rather than the much more efficient present method.

Again this makes OSHA less efficient with no benefit for workers.

Section 4A (d)

S 2153 reduces or eliminates penalties for serious as well as non-serious safety violation in workplaces that have a safety advisory committee and a consultation program.

In fact the consultation program can be the company's own insurance carrier.

The safety advisory committee suffers severely under this proposal. Existing safety committees now document safety complaints in a number of ways: (1) through complaint forms, (2) through minutes of meetings and (3) in some cases through the grievance procedure. None of the above documentation can be utilized to sustain a willful violation,thereby reduc the likelihood of assessment of stern penalties. Obviously this weakens not only OSHA's enforcement but it cripples one of the key strengths of a safety committee by rendering meaningless perhaps months of serious negotiation and documentation of complaints.

Existing safety committees will become paper tigers with no real teeth to bring about necessary changes in the workplace.

With OSHA's New Directions grants and better training and education of workers around the country, safety committees have been greatly strengthened. Meaningful correction of safety hazards is an everyday occurrence. It is this strength in existing safety committees that S 2153 obviously seeks to curtail. Safety committees, joint meetings, complaints and documentation all become a meaningless charade. Again, there is no benefit for the worker.

SUMMARY

In summation, we ask is America willing to live up to its commitment to provide a safe and healthly workplace for every American worker? If so, we submit that passage of S 2153 is obviously not the way to live up to that commitment.

We must leave the necessary administrative changes to the administrators, not to the legislators. The OSHAct was passed with administrative powers built-in so that changes could be made internally without necessitating legislative interference.

The railing of OSHAct critics is based on the sins of a bygone era . We think that the necessary changes have been and are being made administratively.

These critics claim that OSHA has become a vast bureaucracy. If so, why nine years after the Act's implementation are there more game wardens in America than OSHA inspectors? One billion dollars a year is the cost to taxpayers for business write-offs for expense account lunches. That is the same amount of money spent on OSHA in its entire history. Better funding is what OSHA needs in order to better protect the lives of working Americans.

The OSHA Improvements Act of 1980 offers no improvements for workers and no incentives for industry to clean up the workplace. This bill only offers an improved business climate for America's funeral industry. We're tired of burying our fellow workers. Let us instead bury S 2153. And may it rest in peace forever.

Appendix A

Letters to Employer Sent

#2332 Welding flash and welding fumes. No curtain provided. No ventilation.

#2336 Xylene fumes in art work shop. Ten employees on each of two shifts. Poor ventilation. Complainant quit rather than work with the chemicals.

#2339 Asbestos ceiling flaking. Some welding and grinding problems.

#2361 Running small gas engines in shop with no windows and no ventilation. No personal protective equipment.

#2371 Noise complaint. Claims emotionally disturbing.

#2384 No toe boards on construction job. Poor housekeeping. Management ignored complaints.

#2393 Twenty workers. Fifteen exposed to large quantities of dust. No respirators supplied. No drinking fountains in the shop.

#2421 Fumes from broken boiler causing eye irritation and throat irritation.

#2442 Toluene exposure case. No personal protective equipment.

#2452 Chemical spilled in large truck. Workers unloaded for seven hours. Experienced skin and respiratory irritation. Also prolonged loss of taste and smell. Dust respirator given. Company doctor said he chould find no problem. Private doctor said must know what chemical. Worker could not obtain information from company.

#2458 No toilet in shop. Two employees must use floor. Odor causing nausea. Nose irritation and eye irritation and coughing. Also sore throat. No ventilation. (Editors note: This company recieve the National Association of Manufacturers Speed Up Award for 1979 and possibly for all years to come for devising the best idea for cutting down "toilet break time").

#2460 Older woman, 54, asthmatic. Crowded office. Poor ventilation. Left work on one occasion because she couldn't breathe. Asked company to "turn up blowers". Company's reply, "We're trying to save money".

#2466 Wrong types of ear plugs being provided.

#2472 Pharmacist complains of "perc" vapors from dry cleaner vent system in dry cleaner next door. Experiencing headache and exhaustion.

#2483 Ventilation problems in jewelry grinding shop. Rouge and other dusts.

#2501 Blocked passageways. No first aid equipment. Unsanitary eye wear.

#2574 Coolant causing nose bleeds, skin rashes, throat irritation.

Appendix A

Plan to Send Letters to Employer

#2333	Asbestos ceiling flaking.
#2367	Exposed to hydrochloric acid fumes.
#2376	One and a half years exposure to vapors and gases at warehouse. Two employees already quit over it. Doctor treating sinuses.
#2379	Truck and forklift fumes. Unsanitary bathrooms. No personal protective equipment.
#2382	Asbestos brake shoe problems. Poor ventilation. Only surgical masks provided.
#2390	Locked exit problems. Acetate, methyl alcohol and methyl ethyl ketone problems. Poor ventilation.
#2395	Poly Vinyl Chloride dusts and no personal protective equipment. Also heating the stuff. One worker died from embolism after complaining of headache. More workers with headaches now.
#2396	Asbestos. Union shop. Steward quit because of health hazard. Company violated every asbestos regulation. "Asked for tests. Told to work in other area or quit."
#2397	Former employee. Trichloroethylene exposure. Five workers at plant. Only one worker is exposed. This man's doctor told him to stop working around the stuff. So he quit his job.
#2402	Another asbestos brake shoe problem, No personal protective equipment. Small exhaust fan blows fibers into community.
#2403	Inadequate ventilation. Exposure to poly vinyl chloride dust.
#2416	Auto exhaust fume problem under parking garage. Many employees sick and losing time from work.
#2422	Five 12-hour days a week. Exposure to C.C.14 and carbide dust. Welding problems. No personal protective equipment.
#2437	Glue makes worker drowsy. No ventilation. Had filed previous complaint.
#2439	Tearing down building. Asbestos problem.
#2444	Serious asbestos problem in building being demolished. Formerly an asbestos company.
#2445	Forklift fumes complaint.
#2447	Carbon monoxide and exhaust fumes. No ventilation. No personal protective equipment. Some illness.

Appendix A

#2448 Soldering and flux problems.

#2451 Propane fumes and loud noises.

#2457 Forty employees packing pharmaceuticals. They heat, seal plastic bags. Chest pains, difficult breathing, headaches, eye irritation, burning, sore throat and nose bleeding.

#2463 Smoke from hot wax. Poor ventilation.

#2467 Locked exits.

#2473 Soldering. 12 - 15 women. Nausea, dizziness, headaches, pains in chest and hot and cold spells.

#2476 Radioactive problems. No personal protective equipment. Headaches, nausea, etc.

#2480 Employee exposed to glue. Suffers headaches. One woman fainted 12/11/78 but was not taken to hospital. Filthy restrooms. No drinking fountains. No ventilation. No personal protective equipment.

#2485 Pesticide exposure. Worsened emphysema.

#2486 Demolition--asbestos problem. Inspected 7/78. Employer hoodwinked inspector by first wetting down and passing out protective clothing.

#2507 Large clouds of smoke in work area causes breathing problems.

#2508 Twenty to twenty-five workers. Women work with degreaser. No ventilation. Management says do assignment or get fired. Fiber glass dust, no guard on saw, no personal protective equipment. Workers afraid of losing jobs.

#2509 Worker with 5 or 6 children. Headaches from solvents. Once carried out by rescue squad.

#2512 Two hundred workers. Fifteen in complaint area. Welding fumes. Chest pains, upper respiratory trouble and bloody nose.

#2513 Cigarette smoke in office.

#2514 Lots of car exhaust problems. Father of worker called OSHA. Son fears losing job.

#2516 Six men in tunnel shoveling two feet deep asbestos for Amtrak. Respirators and coveralls provided. No medical exams.

#2517 Asbestos on ceilings and pipes. Welding and paint fumes. No personal protective equipment. Coughing, headaches. No heat in warehouse.

Appendix A

#2520 Inadequate ventilation in spray booth. Welding fumes, grinding dust.

#2525 Chemical vapors from hot chemical manufacturing. Eye problems and blurring. T.D.I. and resins. Mixture of other unknown chemicals. Unsafe ladders produced a bad accident.

#2538 Asbestos ceiling dust.

#2539 Welding fumes--no personal protective equipment. Spraying glue. Also no personal protective equipment.

#2540 Woman works with xylene and tetrachlorethylene. Nauseous and headaches.

#2543 Adverse effects from spray painting. Lightheaded, nausea, vomiting and eyes burn.

#2547 Heat and cold problem.

#2548 Restaurant ventilation problem.

#2563 Paint fume problem.

#2566 Leak from air conditioning unit making four secretaries ill.

#2567 Three space heaters causing fire hazard. Paper stored nearby.

#2568 Paint fumes--headaches, nausea, etc. Also skin rash.

#2569 Restaurant. Gas odors.

#2573 Chloroform problems. 47 employees. Lab work. Poor ventilation.

#2576 Welding and carbon monoxide fumes.

#2579 Four toilets for 200 women. Four toilets for 250 men. Poor ventilation in office.

#2580 Asbestos flaking from ceiling.

#2592 Mother complains for son. Degreaser fumes. They don't know chemical.

#2595 Fork lift fumes. Headaches, etc.

#2596 Chlorine compound fumes.

#2600 Welding fumes and flash. No exit signs. Poor bathroom facility. Men denied right to speak to inspector once. Owner's kids, 13, 15, 16 work with welding, punch press etc. after school, some weekends and holidays. Spray painter--no personal protective equipment. People may refuse to work. Expects to lose job.

#2603 Inadequate toilet facilities. Excess dust.

Appendix A

#2605 Exposure to mineral spirits. Poor ventilation. Some sick on job. No personal protective equipment.

#2608 Thirty four workers unload wickerware sprayed with insecticide. One worker quit because of it. Complains of muscle spasms. headache. loss of appetite, eye irritation, and dehydration. No ventilation on containers.

#2613 Arc welding. Poor ventilation.

#2615 Exhaust fumes seeping into office. Headaches. Nausea.

#2619 Asbestos. No personal protective equipment. Some grinding. No personal protective equipment. Some fragments in eyes of one worker.

#2625 Gasoline spill problems.

#2626 Open flame near gasoline tanks.

#2627 No toilet facilities provided for employees.

#2628 Sulfuric acid exposure.

#2629 Mechanical garage doors are operated manually because they're broken (for two years). Man already had work related hernia operation. They still won't fix doors.

#2630 Electrical hazards.

#2634 Employees are not required to wear safety shoes.

#2638 Turbine fumes.

#2639 Carbon monoxide from garage getting in office.

#2640 Fumes from rust proofing operations.

#2644 Spray painting in open area.

#2650 Thirty employees using cleaning agent,,moline #76 disinfectant and fungicide. "Our hands are being eaten away."

#2651 Severe throat irritation and infection from working with glue and no ventilation. Four workers in area. Two are not allowed to work with it. (Doctors' orders.) Claims poly vinyl chloride in glue.

#2655 Fumes from plant "B" are sickening workers in plant "A". Unknown chemicals involved. One pneumonia case so far.

#2656 Ether odors.

#2657 Thirteen employees exposed to carbon phenolic resin dust.

Appendix A

#2660 Company tearing out asbestos ceiling during normal working hours. Whole building getting a good dose.

#2661 Solvents, varnish, fiberglass and dust. Headaches drove her to doctor who told her to move to other work.

#2662 Ten to twelve workers--fire hazards. Locked fire exits. Bad steps. Slipped. Lost a week's work.

#2671 Eight or ten years of exposure to 3M Clearcoat. Eye, nose, throat and skin problems.

Appendix B

FISCAL YEAR	# of Inspections	Increased or Decreased # of Inspections by %	# of Willful Repeat or Serious Violation Citations	Increased or Decreased Amount of Willful Seriou or Repeat Violations by
1974	78,000		4,000	
1976	90,300	16% increase	12,500	212.5% more than 1974
1979	57,900 with worst first policy	36% less than 1976	42,600	965% more than 1974

OSHA's worst first policy of re-focusing resources on the most hazardous industries is clearly evidenced by a reduction (36%) in inspections. Also the phenomenal increase in serious, willful and repeat citations, reflects the abandonment of a scattergun inspection policy as well as an avoidance of nit-pick citations, in favor of a focus on serious health and safety problems. This simple graph is strong evidence that S 2153 is based on a false premise, because OSHA has already refocused its energy and resources on the most unsafe workplaces. This was accomplished administratively; thereby making S 2153 unnecessary.

February 22,1980 APPENDIX C

The Honorable Senator Gaylord Nelson
Member of Congress
U.S. Senate
Washington, D.C. 20510

Dear Senator Nelson:

I am writing to provide you with a critique of Senate Bill S.2153 "Occupational Safety and Health Improvements Act of 1980." I offer my comments from the standpoint of one who has direct knowledge of our nation's workplace safety and health conditions, of OSHA compliance activity, and of employer and employee attitudes towards safety and health regulations. Having worked as an OSHA industrial hygienist/compliance officer, I believe I can provide some insights having direct bearing on the provisions contained in S.2153. Please understand that my views do not represent those of the Occupational Safety and Health Administration. Rather, I submit them as a private citizen and professional who has a deep concern for and commitment to workplace safety and health.

The specifics of my critique are set forth in the attachment to this letter. I have also included some personal recommendations for the types of provisions that would be of benefit in future safety and health legislation. As an overview, permit me to say that S.2153 not only fails to effectively target "safe" versus "unsafe" workplaces, but imposes major restrictions on OSHA's capability to deal with occupational safety and health hazards and to respond to legitimate employee complaints regarding hazardous working conditions. The bill also contains ambiguities in language and intent which will create the opportunity for major legal battles over interpretation and further tie up OSHA's limited resources in legal disputes. The one commendable idea I find in the bill is its encouragement of workplace safety committees, yet even here the bill affords such committees an advisory capacity only and thereby minimizes the influence such committees could exert in the workplace.

I was encouraged to learn that you recently withdrew your sponsorship of this bill (Milwaukee Journal article of 2/10/80). Senator, I would further urge you to try and dissuade your colleagues from voting for S.2153. Although Senator Schweiker may have proposed this bill with the idea of furthering the interests of worker safety and health, his efforts have fallen far short of the mark. The enactment of S.2153 will surely have an adverse effect on OSHA's ability to enforce safety and health regulations and serve the needs of our nation's working population. I believe this decrease in regulatory authority will encourage a return to the relatively lax safety and health control measures prevalent in the decades preceding the OSHAct, and will add to a toll of human suffering that is already much too large.

Respectfully yours,

Mark Nicas

Mark Nicas
Industrial Hygienist
Milwaukee, Wisconsin

[illegible] Limitations on Health Hazard Abatement

There are several areas of ambiguous language and intent that will create immediate questions of interpretation and extensive litigation. Unfortunately, OSHA's legal resources are already overtaxed as the percentage of contested citations has increased to the double-digit level and all new standards are challengel in the courts practically before the ink is dry. OSHA's energies are becoming increasingly tied up in legal proceedings and are diverted from what should be their primary direction- making safety and health inspections.

The first area of ambiguity is the lack of definition of a "health-related" versus a "safety-related" hazard. Please be aware that many job hazards can be described as both health-related and safety-related. In fact, a major trend in safety and health research is an ergonomic view of the workplace that emphasizes the interaction of environmental, mechanical and psychological factors in creating job hazards. For example, if there is a problem with forklift truck accidents, should a safety inspector be sent to look at the integrity and maintenance of brakes, gears, warning signals, etc., or should an industrial hygienist be sent to check chemical exposure such as carbon monoxide which is known to depress the central nervous system and decrease attention span and reaction time? And into whose domain falls an examination of the employee training program or a stress analysis of the controls relative to the work operation?

Another example of overlap is encountered in confined space entry operations, for instance, entry into a trichloroethylene degreasing tank for cleanout and maintenance. Is this safety-related because an employee can quickly die from overexposure to this chemical if the tank is not properly drained and ventilated before entry and no standby employee is present for rescue, or is this health-related because trichloroethylene is a known animal carcinogen and certain air quality measurements must be taken prior to entry and effective respiratory protective equipment must be available?

Please understand that forklift truck and confined space entry operations are not isolated occurrences as they take place in a wide range of industrial settings. And these two examples scarcely exhaust a listing of occupational hazards which escape a concise categorization as either health or safety-related.

A second area of ambiguity is the conflict between the wording of Section 4.A.(a)(2) which purports that S.2153 sets no limits on health hazard inspections, and the language of Section 4.A.(a)(1)(c) which fails to exempt health-related complaints from the advance notice procedure (or does S.2153 recognize advance notice as a limit of authority?), and the language of Section 4.A.(a)(3) which limits the scope of health-related complaint inspections to the items specified on the complaint. The advance notice requirement and the limitations on scope severely decrease OSHA's authority to deal with occupational health hazards.

Furthermore, the exemptions from routine safety inspections granted under Sections 4.A.(b) and (c) may constitute legal precedent for employers' challenging the probable cause of routine (general schedule) health hazard inspections. Due to the delayed onset of most occupational illness, there is little usable workers' compensation data with which to target high health hazard industries. With such lack of evidence for probable cause to make a health hazard investigation, and with the precedent established by S.2153 to require such probable cause for routine safety inspections, I believe most courts would deny OSHA's search warrant applications should employers refuse entry to OSHA industrial hygienists.

the intent of the wording "distinctly separate activities" in Section 4.A.(a)(4). A broad interpretation would appear to allow the artificial compartmentalization of an integrated production facility into a series of separate workplaces that all happen to be physically contiguous. The effect on conducting complaint or general schedule inspections as limited in scope by Section 4.A.(a)(3) would be Kafka-esque.

For example, if a complaint alleged fume exposures to employees at a production welding table, an inspector would be prohibited from investigating 1) noise exposures to employees grinding the welded parts, 2) trichloroethylene exposures to employees degreasing the parts, and 3) lead pigment exposures to employees painting the parts, even though the latter operations were all within the scope of the inspector's physical senses, and even though all involved potential exposure to serious health hazards. The employer could successfully argue that each operation (welding, grinding, degreasing, painting) was a distinctly separate activity and that the investigation had to be limited to the particular workplace mentioned in the complaint, namely, the welding table.

Incidentally, it is not unusual to find several hazardous operations being simultaneously performed in a limited physical location, and I have personally inspected numerous workplaces of this nature.

A fourth area is the failure of Section 4.A.(h)(4) to exempt OSHA compliance officers from claims of liability similar to the exemption afforded advisory safety committee members and consultants. This lack of even-handedness is particularly illogical when S.2153 imposes severe limits on a compliance officer's ability to investigate job hazards. A consultant does not labor under such restrictions and may receive a degree of employer cooperation not afforded to the compliance officer. In addition, OSHA inspectors often find hazardous conditions not covered by any standards or for which the existing standards are inadequate (for example, NIOSH and ACGIH have recommended lowering the present OSHA limits for a number of toxic and carcinogenic chemicals). In this situation, the existing law itself may contribute to an employee injury or illness. It appears that S.2153 would allow the compliance officer to be held responsible as a witness to an event beyond his or her control.

Alternatively, if the Congress feels that compliance officers should be held liable for their "mistakes", then it is still contradictory to exempt consultants from the same liability. There is no a priori reason to allow consultants to perform at a level of excellence lower than that expected of OSHA compliance officers. And if consultants are allowed to perform at a lower professional level, then there is no justification to afford penalty reductions to employers using the services of such consultants per Section 4.A.(d) and (g).

Difficulties with Using Workers' Compensation Data for Exemptions

The use of workers' compensation data to exempt employers from routine safety inspections is beset by major drawbacks. I do not believe the lack of reported injury and illness data per se is a good indicator of the "safe" nature of a workplace or of a workplace that does not merit OSHA's attention. I also feel it deemphasizes OSHA's role in the prevention of occupational injury and illness and shifts it more towards after-the-fact accident investigation and the processing of paperwork (statistical reports, affadavits, etc.).

Over the course of my inspections, I have seen too many shops that report low injury and illness rates and at the same time fail to adequately control serious job hazards. For example, I recently completed an inspection of an outdoor machinery manufacturer in Washington County. On paper the plant looked to be in excellent shape and would not have been targeted as a high safety or health hazard workplace. This employer might even have qualified for an exemption pursuant to Section 4.A.(b) or (c). However, complaints had been filed alleging several hazards, and I made a broad scope inspection.

I found instances of serious overexposure to carbon monoxide, to lead chromate (a lung carcinogen), to welding fumes and to noise. There were also significant exposures to benzene (a leukemogenic chemical) and to asbestos fibers (a carcinogen of the lung and mesothelium). I also found serious violations related to a trichloroethylene degreasing tank entry procedure, serious violations related to lack of proper medical surveillance and employee training, and nonserious violations concerning the operation of a paint spray booth. Due to the citations issued by OSHA, these job hazards are on the way to being controlled, and I anticipate that the employer will pay increased attention to safety and health considerations in the future.

I might add that this company had had the benefit of past safety and health inspections conducted by its insurance carrier, and had a joint union-management advisory safety committee that met regularly. The consultants apparently failed to conduct a thorough survey of the work operations, and the employer failed to adequately respond to those recommendations that were made. The union members on the safety committee were earnestly concerned with the health and safety of their membership, but had no training in assessing the severity of most of the job hazards confronting them. Under the provisions of S.2153, this employer would probably have qualified for exemptions from some of the penalties, yet I do not feel this company's performance would have justified such treatment.

I think that S.2153 recognizes that workers' compensation data grossly underestimates chronic occupational illness and could not be used to identify workplaces free of health hazards. However, one mechanism of targeting workplaces with health hazards is through the "referral system" whereby OSHA safety inspectors conducting safety investigations recognize potential health hazards and refer these conditions to OSHA industrial hygienists for more complete evaluations. Due to OSHA's internal cross-over training which provides safety inspectors with the ability to recognize health hazards, safety inspectors have become more adept at making such industrial hygiene referrals. If the great majority of employers are exempted from general schedule safety inspections, a significant component of OSHA's capability of identifying health hazards will also be eliminated.

One factor contributing to the poor predictive value of workers' compensation data is its failure to reflect the occurrence of "near misses" or, in other words, incidents related to lack of control measures or procedural design errors which could have resulted in serious employee injury and lost work time. For example, instances of slings and hoists breaking and slipping and allowing heavy parts to come close to striking employees would indicate that the employer was not regularly inspecting the structural integrity of the equipment. Of course, these near misses will not show up in workers' compensation reports. A routine safety inspection would identify this hazard before it had continued long enough to result in a serious injury or fatality.

I feel that it is precisely this preventive aspect of routine OSHA inspections that is deemphasized by S.2153 in favor of limiting activity to workplaces with demonstrably poor safety records. Although it is not unreasonable to allocate more resources on particularly hazardous workplaces, I find it illogical to deny great numbers of employees the benefits of OSHA inspections only until workers have been seriously injured. This is akin to forbidding a fire marshal to inspect a building for compliance with local fire codes until the building experiences a major fire.

Due to its limited resources relative to the extent of our nation's safety and health problems, OSHA has already been forced into too much of a fire-fighting role. [At a time when the medical profession and health insurance industry are encouraging the prevention of accidents and disease, it is a step in the opposite direction to limit OSHA's preventive capability in the realm of occupational injury and illness.]

Adverse Effect on Complaint Inspections/ Complaints as a Targeting Mechanism

The bill virtually eliminates OSHA's authority to make inspections in response to employee complaints which allege hazards other than imminent danger situations. Consequently, the bill eliminates an employee's meaningful right to file a complaint and seek relief from hazardous working conditions. This provision also eliminates a particularly effective method of targeting unsafe workplaces for inspection, namely, the complaint procedure, and thereby works against the purported intent of the bill.

Section 4.A.(a)(1)(c) requires OSHA to first notify the employer of the complaint and mandates OSHA take no further action if the employer gives OSHA "satisfactory assurances" that the hazard has been corrected. The language here does not distinguish between safety-related and health-related complaints. No criteria are specified as to what constitutes satisfactory assurance. Such a scheme is entirely inadequate in assuring the elimination of hazardous conditions. Without the authority to make an independent physical inspection of the workplace, OSHA has no way to objectively determine the "satisfactory" nature of the employer's assurances.

During the great majority of complaint inspections I have conducted (all made without advance notice being given), company officials initially contended that no violations existed in the workplace to their knowledge and that the complainants were either honestly mistaken or deliberately harassing the company. Yet greater than 80% of these complaint inspections revealed violations of safety and health standards; many of the hazards were of a serious nature.

I believe it's reasonable to assume that if these same employers had first been notified by OSHA of the complaints, they would have quickly given written assurances that either no hazards existed or that the hazards had been corrected. Under S.2153, no inspections could have been made and the violations would have continued unabated.

For example, an employee at a polyvinylchloride plastics molding plant in Milwaukee County complained of chemical exposures on the job. At the opening conference the company representative sincerely stated that he "knew" no health or safety hazards existed in the shop and that the complainant was "harassing" the company. Upon inspection I found a serious violation of employee overexposure to lead chromate (a human lung carcinogen), numerous instances of a serious safety violation related to unguarded machinery, and significant employee exposures to vinyl chloride monomer (also a human carcinogen). Due to the citations OSHA issued against this employer, the lead chromate exposure was eliminated and the machinery was guarded; the company also paid increased attention to monitoring vinyl chloride exposures. If OSHA had been required to believe the company's initial assurances, which were given in good faith, these hazardous conditions would have persisted.

Moreover, my experience is that the complaint mechanism is an extremely effective way of targeting workplaces which merit OSHA's attention. The vast majority of complaints are filed with OSHA due to legitimate concerns over workplace hazards, and most complaint inspections reveal violations of safety and health standards. Rather than limit OSHA's authority to conduct complaint inspections, it would better serve the intent of S.2153 to increase OSHA's capability to respond to complaints. It would also be beneficial to provide clear language that permits OSHA the discretion to broaden the scope of such investigations to include all operations in the workplace. As previously described, a compliance officer often observes hazardous conditions unrelated to the specific complaint items while in the plant and should not be forced to ignore these conditions as required by Section .A.(a)(3). In addition, the lack of adequate safeguards and control measures in ne phase of a plant's operations often indicates that a poor [illegible]

Employee Safety and Health Committees

The bill's encouragement of joint employee-management safety committees for the purposes of "increasing employee involvement in workplace safety and health matters and improving workplace safety and health conditions" is most commendable and far-sighted. Employee participation is an essential element of any hazard recognition program since employees have an intimate knowledge of the work operation. /OSHA compliance officers regularly confer with employees to determine what hazards the workers themselves perceive as being associated with the job. Employees may even point out hazards that compliance officers as trained professionals might miss; this input is especially significant for operations that are not being performed while the compliance officer is in the plant.

Unfortunately, S.2153 does not provide these safety committees with any real authority. To qualify for a penalty reduction per Section 4.A.(f)(2)(A), the employer need only "consult with" the committee and "respond to" the committee's recommendations. The committee's role is clearly defined as advisory only. Such weak language fails to commit the employer to implementing meaningful controls recommended by the safety committee, yet qualifies the employer for penalty reductions if any response is made. I note that nothing is specified as to what constitutes an adequate "response".

This lack of commitment to follow through on recommendations is facilitated by Section 4.A.(h)(3) which prevents OSHA's using a safety committee report as evidence to establish prior employer knowledge of a hazardous condition for willful and criminal willful violations. This provision is illogical in two ways. On the one hand, S.2153 encourages the employer to view a safety committee as being worthwhile in the recognition of job hazards, but then suggests that the safety committee is not worthwhile enough to merit the employer any liability for ignoring its recommendations. Second, the information provided by such an advisory committee report may be the most relevant evidence available by which a court can objectively judge an employer's "reasonableness" and "good faith" in believing no violation existed, yet the most relevant evidence is excluded from the testimony.

It has been my experience that advisory-type safety and health committees generally have a minimal impact on eliminating safety and health hazards simply because the employer is not obligated to follow the committee's recommendations. This situation is exacerba[illegible] in smaller businesses where the employees may be relatively deficient in recognizing safety and health hazards, and in shops where employees hesitate to criticize working conditions for fear, justified or not, of employer reprisal (almost all employees filing complaints with OSHA request that their names be held anonymous). However, even in large, unionized plants where the union has the economic resources to train its safety and health representatives to a relatively sophisticated level, the union's or safety committee's recommendations often meet with inadequate responses from the employer.

To give an example, I inspected a brass foundry in Kenosha County pursuant to an employee complaint. During my investigation I discovered that the union representing the employees had advised the company to institute ventilation controls for an ash dumping operation in which employees were exposed to dust containing cadmium, lead, nickel, copper and zinc (cadmium is toxic to the kidneys and respiratory tract; lead is toxic to the hematological, renal and nervous systems; nickel is a respiratory tract carcinogen). In the past employees dumping ash had also been exposed to asbestos fibers since asbestos-containing material had been used to line the running troughs from which ash was generated. The only "ventilation" available for the operation was a fan that blew onto the ash dump, thereby dispersing the dust into the surrounding area where more employees could be exposed.

whole ash dump operation, the employer responded to the union's recommendation by having the ash material containing cadmium, one of the more toxic metals, dumped into a separate barrel outside the foundry building. No ventilation was provided for this separate ash dump, however, and the employees were no better off than before.

My air sampling showed significant exposure to airborne lead at the main ash dump which triggered the provision of certain medical surveillance and employee training programs according to the OSHA lead standard. I also found serious overexposures to cadmium, copper, silica and noise, and significant exposures to lead, in other areas of the foundry; instances of a serious safety violation regarding lack of fall protection were also cited. The employer subsequently informed me that a new system had been implemented for the ash dump operation which greatly limited employee exposure to toxic metals. I am certain that if OSHA's regulatory presence had not been available to the union, hazardous exposures would have persisted for a much longer time, and the union's recommendations would have continued to be met with half-hearted responses.

I believe that employee safety and health committees can play a primary role in eliminating job hazards, but only if they are provided with more capability and authority than intended by S.2153. First, employee committee members should be provided with classroom and worksite training in safety and health, for example, in courses offered by competent groups such as NIOSH, OSHA, or universities, and in workplace sessions specifically geared to safety and health problems at the employees' own plants. Second, employee representatives should have available certain monitoring devices and survey instruments that are relevant to the plant's operations, for example, sound level meters to measure noise exposure or stop-time devices to assess the adequacy of press guarding. Third, employee members should be provided with a complete list of all toxic chemicals and hazardous agents used in the workplace, as well as information on toxicity and past safety and health surveys performed at the plant. Finally, employee representatives and/or the joint safety committee should have the authority to shut down an unsafe operation until repairs are made or controls can be installed; employees should also have an important voice in the employer's allocation of economic and personnel resources relevant to safety and health control measures.

Precedent for this employee role currently exists in some union-management contracts. Furthermore, under the Swedish Work Environment Act of 1978, employee-elected safety stewards are given the authority to discontinue work posing immediate danger to employees and to stop work involving long-range hazards such as toxic chemical exposures. If the employer disagrees with the action, the operation remains shut down until the federal inspectorate can be called in to make an evaluation and render a final decision.

In addition, under this law and the 1976 Working Environment Agreement concluded between Swedish employer and trade union federations, a joint labor-management safety committee is required at any workplace with fifty or more employees. The employees comprise a majority of the safety committee which authorizes investigations of plant conditions and decides on control measures. The safety committee also has an advisory role on the choice of production and work methods. It is my understanding that this system of shared responsibility has been found acceptable to both labor and management in Sweden. It would appear to merit an evaluation for its applicability to safety and health in American industry.

In summary, I believe it is proper for OSHA to make routine and complaint-initiated inspections and to retain final authority in assuring compliance with safety and health standards. However, the establishment of meaningful employee safety and health committees would ease the demand on OSHA to function as a policeman and would allow more self-government of hazard recognition and hazard control by the parties directly involved- the employer and the employees.

Recommendations for Future Provisions in Safety and Health Legislation

1. The promulgation of new safety and health standards and the updating of existing standards need to be streamlined and supported by the Congress. A service agency such as OSHA should not be required to perform elaborate economic impact statements to justify lowering exposure levels to known toxic and carcinogenic chemicals or be regularly forced to take new standards to the Supreme Court for final review. I find it disturbing that employer groups criticize OSHA on the one hand for not having sufficient impact on occupational injury and illness (as if OSHA was responsible for the existence of workplace hazards), then turn around to challenge the feasibility of new standards that address job hazards for which there is inadequate coverage. It is time for the Congress to respond to this somewhat hypocritical position by allowing OSHA to promulgate standards on the basis of safety and health criteria, and not on the basis of questionable cost-benefit analyses.

2. As previously discussed, the Congress should encourage or mandate the establishment of employee safety and health committees that have adequate technical capability and meaningful authority in the workplace. In conjunction with this shared governance of job hazard control, the Congress should provide employees the clear right to refuse work which employees reasonably believe poses an immediate danger to life or health. Employees should not suffer any loss of pay or discrimination for their reasonable refusal to work dangerous jobs. If a mutually agreeable solution cannot be reached on site, OSHA could be called in to make a compliance investigation of the job hazard.

3. Employers should be required to maintain a current inventory of all hazardous substances and physical agents used in the workplace, and should be required to label all work materials as to the generic names of their chemical contents. If direct labelling is not practical, the written information could be made readily available. In addition, the employer should be required to provide training to employees handling hazardous substances with regard to health effects, proper work practices and applicable OSHA standards or guidelines recommended by NIOSH or ACGIH. Information on toxicity and relevant standards should be maintained in writing and made readily available to employees along with copies of findings of past industrial hygiene and safety investigations conducted by corporate personnel, consultants and governmental agencies.

Lack of employee knowledge of the hazardous nature of work materials contributes to the continued handling of toxic substances without proper control measures. Provision of such information would eliminate a significant amount of exposure simply by use of protective equipment and control technology already available in the workplace. In addition, informed employees could lobby for change directly with the employer and, again, limit the demand on OSHA to function as an external policeman.

4. The Congress should provide specific language giving OSHA the authority to investigate all phases of an employer's operations relative to safety and healt As previously explained, OSHA compliance officers should not be forced to disregar hazardous conditions just because they are not specified on a complaint form. It would also serve the interests of efficiency to satisfactorily investigate a workplace in one inspection rather than making several inspections covering different areas.

5. The Congress should provide specific language authorizing OSHA to use personal sampling equipment worn by employees to measure exposures to hazardous chemical and physical agents. Some employers have recently challenged the use of such equipment by claiming that the equipment itself poses a hazard to the employees; unfortunately, at least one circuit court has upheld this line of specious reasoning.

The advent of sampling devices worn by employees has been one of the major advances in modern industrial hygiene. Such devices permit continuous monitoring of the worker's actual exposure; past equipment allowed only stationary monitoring of a fixed, limited area and generally failed to provide an accurate measure of employee exposure to hazardous substances and physical agents. Personal monitoring devices have been used for the past decade by corporate, private and governmental industrial hygienists without incident. Yet in the same time frame, illness and disease has continued to develop from inadequately controlled workplace exposures.

The Congress and the judiciary should not permit restrictions on OSHA's efforts to measure and control real health hazards by giving credence to unfounded arguments served up by imaginative legal advisors. Frankly, our nation's health and economy cannot afford it.

by Ansel Adams in This is the American Earth

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TESTIMONY PROVIDED FOR THE RECORD
BY BROCK EVANS, ASSOCIATE EXECUTIVE DIRECTOR,
A. BLAKEMAN EARLY, WASHINGTON REPRESENTATIVE,
AND HARVEY STEINBERG, STATE LEGISLATIVE CHAIRMAN,
SIERRA CLUB
TO THE
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
ON S. 2153
THE OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980
MAY 9, 1980

The Sierra Club is pleased to have the opportunity to provide comments for the Record on S. 2153, the Occupational Safety and Health Improvements Act of 1980.

The Sierra Club is dedicated to the protection and enhancement of the human environment. The Club considers the workplace environment as an integral part of that environment. The Sierra Club supported the passage of the Occupational Health and Safety Act of 1970 as one of several laws which established controls to prevent human injury rather than responding to human injury after the fact. This concept is as essential for protecting workers from toxics, under section 6b(5) of the Act, as it is to protecting members of the public at large not at worksites under section 112 of the Clean Air Act, or section 307 of the Clean Water Act. In fact, the often-higher concentration of toxics at the worksites makes the concept and its application even more imperative for them.

All too often, workers have served as human guinea pigs, whose exposure in the workplace and subsequent disease has induced the ambient environmental controls of toxics for those fortunate enough not to encounter these substances in the workplace. Often, the controls are tardy, to the severe detriment of both the workers and the public. It was only after fifty years of linking exposure of workers to asbestos with their contraction of lung cancer and asbestiosis that OSHA issued workplace standards. This in turn prompted EPA to develop ambient emission standards for asbestos and the Consumer Product Safety Commission to ban the use of asbestos in patching compounds, as well as restriction of the manner in which asbestos is applied during high-rise construction by many state and local health departments. Unfortunately, the OSHA still often uses worker illness and death as its principal indicator of the need for a standard to control exposure to toxics. For instance, it was not until workers were found to be dying of angiosarcoma, a rare liver cancer, at unusually high rates, that OSHA regulated workplace emissions of the suspected cause, vinyl chloride. EPA was stimulated to control ambient releases from vinyl chloride and polyvinylchloride industrial facilities.

It is therefore with significant concern that the Sierra Club contemplates the proposed changes to the OSHA found in S. 2153. These modifications go to the heart of the preventive approach to protecting humans in their environment. Indeed, S. 2153 would require actual worker injury prior to effective enforcement action. While any enforcement program should be expected to concentrate on the areas of greatest problem and concern, compliance among the remaining bulk of the regulated community is highly dependent upon a sure, albeit random, system of enforcement actions. This concept pervades other environmental regulatory programs, as well as our tax system. All these programs rely on essentially a token enforcement regime. By *guaranteeing* an employer that he will be immune from enforcement action or inspection, a major incentive which encourages compliance will be removed. We urge the Committee to reject this approach which has no place in the regulation of toxics in the human environment.

In addition to the inappropriate general approach of S. 2153, we have the following specific comments regarding the effects of provisions which purport to affect only safety regulation, yet actually also impact on worker health.

Section 4A(a)(2) of S. 2153 exempts the authority of OSHA to control health hazards from application of the Act. However, nowhere are health-related hazards, as distinct from safety-related hazards, defined. In situations where exposure to toxic chemicals cause acute physical effects and impair a worker's ability to perform on the job in a safe manner, the difference between a health and safety hazard becomes indistinct. Since there is a large disparity between the safety inspection requirements under the proposed Act and the authorities OSHA has to conduct health hazard inspections, which require no notice, this point is likely to become hotly contested. Further, it is impossible to establish what ambient concentrations of a toxic substance an employee may be exposed to if an employer is notified of an inspection beforehand and is able to take measures to disperse potentially hazardous air pollutants prior to the inspection.

Another area of major concern is the provision in section 4(A)(a)(4) which is intended to restrict safety inspections from being extended to "distinctly separate activities." Aside from the difficulty of defining what such activities are, we are greatly concerned that activities which may pose a health hazard to workers and could be investigated by a safety inspector under existing law, may no longer be subject to such investigation with a subsequent referral to a health officer for a health hazard follow-up inspection. A significant number of health hazards are in fact identified by safety inspectors who recognize a potential health hazard and refer these conditions to OSHA industrial hygienists for more complete evaluation. If the Committee is concerned about allocating OSHA resources to those employer facilities which genuinely need attention, it makes little sense to artificially restrict a safety inspector from identifying and referring a potential health hazard through the use of this "distinctly separate activities" concept. S. 2153 recognizes that worker compensation data does not adequately estimate the existence of occupationally-derived illnesses in a reliable fashion in order to identify work places which are free from health hazards. Nevertheless, the impact of the provision will be to remove a major means by which health hazards are currently discovered and rectified prior to causing worker injury.

We have concerns about the manner in which the bill addresses joint employee-management safety committees for purposes of "increasing employee involvement in workplace safety and health matters and improving work place safety and health conditions." Clearly, a cooperative effort on the part of employees and management to reduce workplace hazards can yield highly successful results. Employees and their labor representatives have the knowledge of their workplace which enables them to identify hazards which might otherwise go undetected. They also have that essential ingredient that management cannot have--a vital interest in their own health and lives. However, S. 2153 relegates the Committee's role to that of an Advisory Committee only. There is no language which commits the employer to implementing the recommendations provided by the Committee, yet he may still qualify for a penalty reduction under Section 4A(f)(2)(A). Indeed, a safety committee report may not even be used as evidence to establish prior employer knowledge of a hazardous condition for purposes of willful criminal violations. We fail to comprehend why the creation of a vehicle for improved employer-employee communication concerning safety and health matters qualifies the employer for penalty reduction, yet does not have evidentiary value in criminal prosecutions. Since it is clearly the intent of some members of the Committee to apply the approaches of S. 2153 to workplace health threats in future legislation, we urge the Committee to re-examine the advisory committee provisions to ensure that the supposed benefits which accrue to employees from the creation of such committees are fundamentally equal. In our view, such committees could be delegated considerably greater power in the examination and resolution or elimination of safety and health threats, but only if a mechanism which ensures compliance with such resolutions is also created.

The Sierra Club cannot support S. 2153. This bill threatens to considerably undercut a major goal of preventing both safety and health threats in the workplace prior to the onset of worker injury. We believe that this society has moved well beyond the human guinea pig approach to regulating public health and environmental hazards.

STATEMENT OF MARK A. ROTHSTEIN

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Summary

By all measures, enforcement of the Occupational Safety and Health Act has improved dramatically since 1977. Serious problems still remain, however, and Congress and the public are justified in questioning OSHA's expense, effectiveness, and priorities.

S. 2153 will not alleviate any of OSHA's current problems. To the contrary, S. 2153 is likely to lessen safety and health efforts at the vast majority of American workplaces. Furthermore, the amendment could lead to an irreversible decline in governmental and private sector commitment to the goal of safe and healthful workplaces.

Because of Congressional and administrative initiatives, OSHA enforcement is in the midst of undergoing significant changes. For example, the fiscal 1980 appropriations limitations were implemented as recently as January 1, 1980. Prudence suggests that these new programs be given a reasonable period for effectuation and evaluation before more drastic and permanent measures are adopted.

OUTLINE

Page

I. WHY OSHA "GOT OFF TO A BAD START" 1

  A. Lack of Adequately Trained Inspectors 1
  B. Insufficient Employee Training Programs 2
  C. Poor Consultation Programs 3
  D. Shortcomings in Initial Standards Package 3
  E. Slow Development of Health Standards 4
  F. Distorted Enforcement Priorities 5
  G. Lack of Acceptance by Employers 7

II. ADMINISTRATIVE AND CONGRESSIONAL RESPONSES 8

  A. More and Better Trained Inspectors 8
  B. New Employee Training Programs 8
  C. Improved Consultation Program 9
  D. Revised Safety Standards 9
  E. Expanded Health Standards 11
  F. More Appropriate Enforcement Priorities 11
    1. More Selective, Vigorous Enforcement 11
    2. Revised Complaint Procedures 14
    3. Congressional Appropriations Limitations 15

  G. Toward Better Public Acceptance 16

III. THE PERCEIVED NEED FOR OSHA "REFORM" 17

  A. High Costs 17
    1. Total Cost 17
    2. Small Business 18
    3. Congressional Policy 19

  B. No Reduction in Injury Statistics 19
  C. Continued Complaints by Business About OSHA 21

IV. THE DRAWBACKS TO S. 2153 22

  A. General Criticisms 22
    1. The Most Recent Changes in OSHA Need Time for Evaluation 22
    2. S. 2153 Would Turn OSHA Into an Accident Investigation Agency 23
    3. S. 2153 would Encourage Inaction by Employees 23
    4. S. 2153 Would Bring About Illogical and Unacceptable Results 24
    5. S. 2153 Is Inconsistent with the Congressional Intent of OSHA 24

Page

B. Specific Criticisms 25

1. § 4A (a)(1)(A) 25
2. § 4A (a)(1)(C) 25
3. § 4A (a)(3) 26
4. § 4A (b) 27
5. § 4A (c) 28
6. § 4A (d)(1)(A) and (B) 28
7. § 4A (d)(2) 29
8. § 4A (f)(2)(E) 30
9. § 4A (g) 30
10. § 4A (h)(1) 31
11. § 4A (h)(2) 31
12. § 4A (h)(4) 32

V. CONCLUSION 34

I. WHY OSHA "GOT OFF TO A BAD START"

It is beyond dispute that OSHA enforcement was abysmal in the first few years after the Act took effect in 1971. In stark contrast to the salutary and noble goals of the statute were the realities of OSHA enforcement: A lack of direction and an absence of sensible priorities resulted in the disillusionment of the Act's supporters and the antagonism of the Act's foes.

To assess the present posture of OSHA and to analyze its future, it is helpful to look at the specific reasons for OSHA's past failings.

A. Lack of Adequately Trained Inspectors

OSHA was the Federal Government's first comprehensive effort to eliminate workplace injury and illness. To implement such a sweeping enforcement program, a large number of well-trained safety and health professionals was needed. Unfortunately, this need was not satisfied.

In June, 1973, more than two years after the Act took effect, OSHA had a staff of only 456 compliance safety officers and 68 industrial hygienists[1] to serve five million workplaces[2] and 65 million employees.[3] By contrast, the Bureau of Mines had 700 inspectors for 23,000 mine sites.[4]

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[1] The President's Report on Occupational Safety and Health, 1973 (GPO No. 4000-00288) (Dec. 1973), p. 33.

[2] U.S. Department of Labor, Occupational Injuries and Illnesses in the United States, by Industry, 1974 (1976), p. 1.

[3] U.S. Department of Labor, Occupational Injuries and Illnesses in the United States, by Industry, 1973 (1975), p. vii.

Not only was there a shortage of inspectors, but the compliance staff was poorly trained. Most inspectors lacked a formal safety and health education and were given only a four-week training course of questionable quality before being "turned loose" on American business.[5] Rather than viewing their mission as to assist in the elimination of workplace hazards, some inspectors were only concerned with citing employers for as many violations as possible.[6] Because the inspector was often the first and only direct link between OSHA and the business community, much ill will and misunderstanding was generated from the start.[7]

B. *Insufficient Employee Training Programs*

Congress intended that OSHA be a cooperative effort by employers, employees, and government. Little effort was made, however, to develop safety and health awareness "from the bottom up" through employee training and education programs.

In 1973 OSHA conceded that its program for private sector training "was inadequate for achieving substantial gains in voluntary compliance."[8] In 1974 OSHA initiated a series of correspondence courses and one day seminars, but there was little progress in designing or implementing large scale training programs.

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[4] C. Culhane, "Labor, Business Press Administration to Change Safety and Health Program," *National Journal* (Wash., D.C.) June 1, 1972, p. 1094, citied in N. Ashford, *Crisis in the Workplace: Occupational Disease and Injury* (Cambridge, Mass., 1976), p. 427.

[5] N. Ashford, *Crisis in the Workplace: Occupational Disease and Injury* (Cambridge Mass., 1976), p. 448.

[6] G. J. Tysse, "'Big Mother' and the Businessman," *Trial* vol. 11, no. 5 (Oct. 1975) p. 14, 22.

[7] *Ibid.*, p. 30.

C. Poor Consultation Programs

OSHA's on-site consultation program was given a low priority in the allocation of funds and energy. There was never a direct OSHA consultation program, but rather joint efforts between OSHA and the states. The result has been a lack of coordination and a hodge podge of poorly administered programs inplemented by state and private consultants.[9] As late as June, 1977, only 12 of 31 states without state plans offered on-site consultation.

Presumably, consultation programs are of special benefit to small employers. One study of National Federation of Independent Business (NFIB) members, however, indicated that less than three percent of the 420,000 members requested compliance assistance.[10]

D. Shortcomings in Initial Standards Package

To assure workers that they would be afforded protection soon after the passage of the Act, § 6(a) authorized the Secretary to adopt national consensus standards and established federal standards without complying with § 6(b) or APA rulemaking procedures. These standards, especially the national consensus standards, were the source of numerous problems and legal controversies.

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[8] The President's Report on Occupational Safety and Health, 1973 (GPO No. 4000-00306) (Jan. 1975), p. 13.

[9] Comptroller General's Report to the Congress, "Labor Needs to Manage its Workplace Consultation Program Better," (GAO HRD-78-155) (Dec. 18, 1978).

[10] W. Dunkelberg, "OSHA Activity in the Small Business Community," (available from National Technical Info. Serv., U.S. Dep't of Commerce) (April, 1976), p. 10.

Most of the difficulties with national consensus standards can be traced to the fact that they were privately-adopted, *optional* measures. The standards were inartfully drafted. Many hopelessly outdated standards were not revoked. Often the standards were written in extremely general and vague terms. Most of the standards were couched as specification standards (*e.g.*, ladder rungs must be one inch in diameter) rather tham more flexible performance standards (*e.g.*, ladder rungs must be capable of supporting 500 pounds). Some standards were redundant or contradictory. Other standards were merely directory or were never intended to be given binding effect.[11]

As a result of these deficient standards, employers were often unclear about their responsibilities under the Act. Yet, they were expected to comply with every standard to the letter. This accounted for much of OSHA's "nitpicking" image and the occasional abuses by inspectors led to devastating publicity and a further entrenching of anti-OSHA hostility.

E. Slow Development of Health Standards

Although the initial standards package contained some health standards, it was primarily concerned with safety standards.

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[11] R. Hamilton, "The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health," *Texas Law Review* vol. 56, p. 1329 (1978); Moran, "Occupational Safety and Health Standards as Federal Law: The Hazards of Haste," *William and Mary Law Review* vol. 15, p. 777 (1974).

There was an urgent need for scientific research and the promulgation of health standards to prevent the 100,000 deaths each year from occupational diseases.[12]

NIOSH was understaffed, underbudgeted, and ineffective in developing health standards.[13] Nevertheless, between the effective date of the Act and September 1, 1974, NIOSH produced eighteen criteria documents with standards recommendations. OSHA produced only one final standard.[14]

F. Distorted Enforcement Priorities

Instead of focusing its enforcement energies on health hazards and serious safety hazards, OSHA concentrated on trivial and insignificant matters. These conclusions are supported by the following statistics.

In fiscal 1974 (the first year these figures were kept) 97 percent of all inspections were for safety hazards. There were 74,753 safety inspections and only 2,340 health inspections.[15]

In fiscal 1973, 98.7 percent of all alleged violations were cited as nonserious. There were 150,947 nonserious violations and only a total of 2,049 serious, repeated, and willful viola-

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[12] The President's Report on Occupational Safety and Health, 1972 (GPO No. 2915-0011) (May, 1972), p. 111.

[13] J. Page and P. Munsing, "Occupational Health and the Federal Government: The Wages Are Still Better," Law and Contemporary Problems vol. 38, p. 651, 654-657 (1974).

[14] Ibid.

[15] OSHA Compliance Activity Report for FY 1974 (April 30, 1976).

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tions.[16] Not only was the focus on nonserious hazards, but many serious hazards went undetected.[17] Follow-up inspections to determine if hazards were abated were not conducted promptly and were often not conducted at all.[18]

In fiscal 1973, the 152,996 violations carried average proposed penalties of only $32.30.[19] By fiscal 1976, 380,356 violations were cited, but the average proposed penalty was still only $32.73.[20]

Until recently, OSHA assigned a high priority to conducting inspections based on employee complaints. In fiscal 1979, 34.8 percent of all inspections were based on employee complaints.[21] According to a GAO study however, 80 percent of all complaint inspections failed to reveal serious hazards or any hazards at all.[22]

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16. OSHA Compliance Activity Report for FY 1973 (May 7, 1974).

17. Comptroller General's Report to the Congress,"Workplace Inspection Program Weak in Detecting and Correcting Serious Hazards," (GAO HRD-78-34) (May 19, 1978).

18. Ibid.

19. Based on OSHA Compliance Activity Report for FY 1973 (May 7, 1974).

20. Based on OSHA Compliance Activity Report for FY 1976 (July 23, 1976).

21. Based on OSHA Compliance Activity Report for FY 1979 (Nov. 6, 1979).

22. Comptroller General's Report to the Congress, "How Effective Are OSHA's Complaint Prodedures?" (GAO HRD-79-48) (April 9, 1979).

G. Lack of Acceptance by Employers

Although unions, public interest groups, and Government leaders were not happy with OSHA's slowness in promulgating health standards and its misordered priorities,[23] employers voiced the loudest objections to OSHA's seeming nuisance enforcement. OSHA's poor image with employers stemmed from the following criticisms:

1) OSHA standards are difficult to understand
2) Current standards do not affect many of the major causes of workplace injuries
3) Inspections are not focused on employers with the worst injury records or on real hazards causing the most injuries
4) Inspectors are often poorly trained and unfamiliar with the businesses they inspect
5) Enforcement is often arbitrary and inconsistent, both between establishments and across inspections in the same establishments
6) An "adversary attitude" on the part of OSHA hinders rather than promotes improvement in workplace safety and health
7) The agency has not fully accepted the reality that perfect protection cannot be accomplished and hard

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[23] See H. Metzenbaum, "The Occupational Safety and Health Act: A Promise that Failed," Akron Law Review vol. 8, p. 416 (1975).

choices between competing priorities must be made.[24]

II. ADMINISTRATIVE AND CONGRESSIONAL RESPONSES

A. More and Better Trained Inspectors

As of February, 1979, OSHA had 1507 inspectors. There were 962 safety officers and 545 industrial hygienists.[25] Of equal importance, OSHA inspectors are now better qualified and better trained. OSHA now requires that industrial hygienists have at least a bachelor's degree in a physical or natural science or engineering. OSHA safety engineers must have either a bachelor's degree in engineering or must be licensed professional engineers. OSHA safety specialists must have at least three years of safety experience.[26]

B. New Employee Training Programs

In 1978 OSHA embarked on a program of awarding grants for the development of nonprofit safety training centers. Grants were awarded in four categories: labor organizations, employer associations, educational institutions, and nonprofit organizations. The first awards of $6.4 million in grants to 86 groups were announced on October 8, 1978. For fiscal 1980, $11 million has been budgeted for training grants.

It is too soon to assess whether the grant program will be successful or whether OSHA will have to become more directly involved in the actual training process.

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[24] Final Report of the Interagency Task Force on Workplace Safety and Health (Dec. 14, 1978), p. II-6.

[25] Source: OSHA's Office of Information, Jan., 1980.

[26] Source: OSHA's Office of Personnel, Jan., 1980.

C. Improved Consultation Program

In 1977 OSHA increased the amount of federal funding for consultation programs from 50 percent to 90 percent for states with and without approved state plans. By January 1, 1979, every jurisdiction had some form of on-site consultation program: 7 states with approved state plans provided on-site consultation directly; 16 states with approved state plans provided on-site consultation under § 23(g) grants; 23 non-plan states provided on-site consultation under § 7(c)(1) agreements; the remaining 10 jurisdictions had on-site consultation by direct contracts between OSHA and private firms.[27]

In response to GAO criticisms of the program, OSHA has indicated that it plans to require that consultants receive better training and closer monitoring.

An amendment begun in the fiscal 1979 Labor Department-HEW Appropriations Act, P.L. 95-480 (Oct. 18, 1978), prohibits assessment of penalties for nonserious violations against any employer with 10 or fewer employees which requests an on-site consultation and makes good faith efforts to eliminate the hazard.

D. Revised Saftey Standards

On October 24, 1978, OSHA revoked 607 general industry standards and 321 special "vertical" standards covering barrel-making, bakery equipment, and laundry machinery and operations. The revoked standards were considered unnecessary or unrelated to occupational safety and health. On September 24, 1979, OSHA proposed a major revision of the electrical standards for general industry. The new standard would end mandatory reference to the 250,000-word 1971 National Electrical Code (NEC) and substitute a 15,000-word text reflecting NEC updates. On November 13, 1979, OSHA indicated that among those standards projects in development were: revisions to simplify fire protection standards; consolidation of ship repairing, shipbuilding, and shipbreaking standards; and simplification of standards covering ladders and scaffolding.[28]

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[27] Comptroller General's Report to the Congress, "Labor Needs to Manage its Workplace Consultation Program Better," (GAO HRD-78-155)(Dec. 18, 1978), p. 55.

E. Expanded Health Standards

OSHA has made some progress in promulgating important health standards, such as lead, benzene, coke oven emissions, and cotton dust. Delays in implementing the standards have resulted from the protracted legal challenges to the standards brought in the United States Courts of Appeals pursuant to § 6(f). The case challenging the benzene standard,[29] now pending before the Supreme Court, promises to resolve many legal questions such as the amount of scientific evidence needed to support the issuance of a standard and the relationship between the estimated costs and benefits of new standards.

On January 22, 1980, OSHA promulgated its long-awaited standard covering the identification, classification, and regulation of occupational carcinogens. This "generic cancer standard" seeks to provide the framework for promulgation of standards dealing with the estimated 500 cancer causing substances found in American workplaces. Whereas OSHA has promulgated only seven carcinogen standards in the Act's first nine years, it is officially hoped that based on this new rulemaking initiative, ten new carcinogens can be regulated each year. Nearing completion are standards on beryllium, chromium, and pesticides.

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[28] 44 Fed. Reg. 65,566 (Nov. 13, 1979).

[29] American Petroleum Institute v. OSHA, 581 F.2d 493 (5th Cir. 1978), cert. granted, 99 S.Ct. 1212 (1979).

F. More Appropriate Enforcement Priorities

1. More Selective, Vigorous Enforcement

OSHA inspections may be divided into two broad classes: unprogrammed (imminent dangers, catastrophe and fatality investigations, and employee complaints) and programmed inspections. On December 6, 1978, OSHA issued its scheduling system for programmed inspections. The system is somewhat complex, but allocates 95 percent of programmed inspection resources to high hazard industries. Inspections are determined primarily by the injury rate for the employer's standard industrial classification (SIC) and the employer's size.

Under OSHA's "common sense" approach, announced in 1977, if there is noncompliance with a standard, but employees are afforded equal or greater protection or if noncompliance creates no direct or immediate relationship with occupational safety and health, no citation will be issued.

The following tables[30] clearly show the following changes in the nature of OSHA enforcement: 1) a decrease in the overall number of inspections; 2) a decrease in the number of safety inspections; 3) an increase in the number of health inspections; 4) a decrease in the overall number of violations cited; 5) a decrease in the number of nonserious violations cited; 6) an increase in the number of serious, willful, and repeated violations cited; and 7) an increase in the amount of penalties assessed.

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[30] Figures are based on OSHA Compliance Activity Reports, FY 1973-FY 1979. These and other tables are contained in M. Rothstein, "Judicial Review of Decisions of the Occupational Safety and Health Review Commission, 1973-1978: An Empirical Study," Chicago - Kent Law Review vol. 56, p. ____ (1980).

Table 1

Safety Inspections and Health Inspections

FY 1974 to FY 1979

Year	Total Insp.	Safety	%	Health	%
1974	77,093	74,753	97.0	2340	3.0
1975	80,949	73,331	90.6	7618	9.4
1976	90,369	84,854	93.9	5515	6.1
1977	59,932	51,091	85.2	8841	14.8
1978	57,242	46,625	81.5	10,617	18.5
1979	57,937	46,796	80.8	11,141	19.2

Table 2

Violations Alleged, by Degree,

FY 1973 to FY 1979

Year	Total Viols.	Nonserious	%	Serious	%	Repeated and Willful	%
1973	152,996	150,947	98.7	--------	---	2049*	1.3
1974	292,185	287,896	98.5	3226	1.1	1063	0.4
1975	318,792	312,805	98.1	--------	---	5987*	1.9
1976	380,356	367,778	96.7	7820	2.0	4758	1.3
1977	181,942	156,425	86.0	20,914	11.5	4603	2.5
1978	134,484	96,356	71.6	33,155	24.7	4973	3.7
1979	128,544	85,871	66.8	37,718	29.3	4955	3.9

*For 1973 and 1975, serious, willful and repeated violations were reported as a single figure.

Table 3

Penalties Proposed by OSHA per Violation,

FY 1973 to FY 1979

FY	Violations	Penalties	Average Penalty
1973	152,996	$ 4,942,972	$ 32.30
1974	292,185	6,825,328	23.36
1975	318,792	8,245,496	25.86
1976	380,356	12,449,706	32.73
1977	181,942	11,601,062	63.76
1978	134,484	19,839,467	147.52
1979	128,544	22,966,230	178.66

2. Revised Complaint Procedures

Effective September 1, 1979, OSHA will respond to formal (written) complaints by conducting an inspection except where: 1) an evaluation indicates no reasonable grounds to believe that a violation exists; 2) the complaint involves a condition with no direct or immediate relationship to safety and health; 3) a recent inspection or other objective evidence indicates that the hazard is not present or has been abated, or 4) the complaint is not within OSHA's jurisdiction. OSHA will inspect based on a complaint alleging an imminent danger within 24 hours, a serious hazard within three working days, and other conditions within 20 working days.

If a nonformal complaint is received OSHA will usually respond by sending a letter to the employer describing the alleged hazard and requesting abatement within a certain time. The complainant will also be notified and requested to inform OSHA if no corrective action is taken by the specified time. An inspection will be conducted if the employer fails to respond to OSHA's letter or the complainant indicates that no abatement measures have been taken. Inspections will also be conducted for all imminent danger situations, other "extremely dangerous working conditions," and where there is employee exposure to toxic substances.

3. Congressional Appropriations Limitations

Beginning in 1976, Congress attempted to channel OSHA's enforcement activities into the most needed areas and to relieve the burden on employers in industries with little or no serious occupational safety and health hazards.

The Labor Department-HEW Appropriations Act for fiscal 1977 contained two limitations. First, no penalties could be assessed for first-instance nonserious violations unless ten or more violations were cited. Second, farmers with ten or fewer employees, except those with migrant labor camps, were exempt from the Act.

These limitations were contained in fiscal 1978 and were supplemented by two additional provisions in the fiscal 1979 appropriations. First, OSHA could not promulgate or enforce any regulation restricting work activity in any recreational hunting, fishing, or shooting area. Second, no penalties for nonserious violations could be assessed against small employers that requested on-site cosultation and made good faith efforts to abate violations.

The continuing appropriations resolution for fiscal 1980, signed by President Carter on November 20, 1979, contained the four previous limitations and added three important new ones. The most important provision limits OSHA from inspecting employers with ten or fewer employees in industries with three-digit Standard Industrial Classification (SIC) injury and illness rates of less than seven per one hundred employees. The SIC is based on the 1977 BLS survey. There are several exceptions to the limitation, including the following, which permit inspections: in response to complaints, for failures to correct, for willful violations, to investigate accidents, for imminent dangers, for health hazards, and to investigate discrimination complaints.

This limitation was implemented by OSHA in a memo issued January 1, 1980. A total of 51 small business categories were listed as being exempt.

Under the 1980 Appropriations Bill, OSHA is also prohibited from inspecting workplaces in states with approved plans for six months after a state inspection, except for investigation of employee complaints and fatalities, special studies, and accompanied monitoring visits.

A final new limitation prohibits any enforcement activity on the Outer Continental Shelf in excess of the authority granted to OSHA in the Outer Continental Shelf Lands Act or the Outer Continental Shelf Lands Act Amendments of 1978.

G. Toward Better Public Acceptance

Dr. Eula Bingham, Assistant Secretary of Labor for OSHA has written: "When we are finally doing our job effectively and fairly and with compassion, then I believe we will have earned the respect and support of the American public."[31] Despite its much improved recent record, "building a broader constituency" remains one of OSHA's biggest problems.[32]

III. THE PERCEIVED NEED FOR OSHA "REFORM"

A. High Costs

1. Total Costs

The OSHA budget for fiscal 1978 was $136,600,000.[33] In addition, the annual cost of compliance with OSHA in 1978 has been estimated at $4.3 billion.[34] The argument has been made that OSHA is simply too expensive, especially considering the lack of effectiveness of the Act.

Other studies suggest that the benefits of OSHA outweigh its costs. According to Ralph Nader,[35] OSHA's safety program prevents 350 deaths and 40,000 to 60,000 injuries each year. This results in an annual benefit of $5.1 billion. In addition, OSHA results in new jobs, lost worktime, increased productivity, and other benefits.

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[31] E. Bingham, "OSHA: Only Beginning," Labor Law Journal vol. 29, p. 131,136 (1978).

[32] Final Report of the Interagency Task Force on Workplace Safety and Health (Dec. 14, 1978), p. VIII-1.

[33] Source: The Budget of the United States, 1979, Appendix.

[34] Annual McGraw-Hill Surveys, Investment in Employee Safety and Health, 1972-1978.

[35] R. Nader, M. Green and N. Waitzman, Business War on the Law: An Analysis of the Benefits of Federal Health/Safety Enforcement (1979).

2. Small Business

An argument that is frequently made is that OSHA is especially burdensome on small business. This sentiment was characterized by Senator Bartlett, in August, 1978:

> Mr. President, the current pace of inflation makes it increasingly difficult for small businesses to compete effectively in the marketplace. Excessive government regulation exacerbates their problems . . . My intention here is only to provide relief to those small businesses which are burdened most by the plethora of OSHA regulations . . . .[36]

The facts, however, tend to refute the assertion that OSHA has been overly burdensome on small business.

A study of the 420,000 members of the National Federation of Independent Business (NFIB), conducted in 1974 and 1975 (before the beginning of appropriations limitations) demonstrates that OSHA has not had a measurable impact on small business. As of 1975, only 12.3 percent of these businesses were inspected.[37] Of those inspected, only 51.0 percent were cited for violations.[38] Of those cited, 49.0 percent received no penalty, another 46.3 percent were assessed a penalty of under $250.[39] Where there were citations, the cost of abating violations was $0 for 49.0 percent and under $250 for another 30.2 percent.[40] Only 0.3

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[36] Cong. Rec. p. S-12325 (Aug. 2, 1978).

[37] W. Dunkelberg, "OSHA Activity in the Small Business Community," (available from National Technical Info. Serv., U.S. Dep't of Commerce) (April, 1976), p. 11.

[38] Ibid.

[39] Ibid., p. 18.

[40] Ibid.

percent of the employers studied were cited and had compliance costs of more than $1500.[41]

3. Congressional Policy

The Senate Committee on Governmental Affairs recently commented on the misleading nature of estimated costs of compliance.

> In summary, available estimates of total costs are neither precise nor wholly reliable, and typically involve little systematic consideration of any consequential benefits of Federal regulation. Thus all too often, the public is informed sometimes dramatically of large costs imposed by regulatory activities, but without a similar effort to indicate the advantages gained for society through those requirements. As a result, general assertions on whether the burden is too great, or whether the expense far exceeds the benefits, should--on the basis of existing knowledge--be guarded and qualified.[42]

Admittedly, OSHA does require substantial expenditures, but the Congressional intent underlying the legislation is apparent. "There can be no question that OSHA represents a decision to require safeguards for the health of employees even if such measures substantially increase production costs."[43]

B. No Reduction in Deaths or Injuries

From 1972 through 1978, the overall injury/illness rate has declined from 10.5 to 9.4 per 100 employees. The injuries and illnesses resulting in lost workdays increased from 3.2 to 4.1 per 100 workers. While these figures are not conclusive, they do suggest "that the success of the act in delivering on its promise has been substantially less than overwhelming."[44]

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[41] Ibid.

[42] Senate Committee on Governmental Affairs, Study on Federal Regulation, S. Doc. No. 96-13, 96th Cong., 1st Sess. (Dec. 1978), vol. VI, p. 69.

[43] Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 477 (D.C. Cir. 1974).

While all supporters of workplace safety and health are disheartened by these figures and 4,590 workplace fatalities reported in 1978, it is well known that injury and illness statistics are not conclusive indicators of OSHA's impact. To begin with, to determine whether OSHA has worked it would be necessary "to predict what injury rates would have been in the absence of OSHA and to compare those figures with the actual rates."[45] Obviously, there are no figures available on what the injury and illness rate would have been without OSHA.

Second, it has been estimated that only about 25 percent of injuries are preventable by enforcement of present OSHA standards.[46] The remaining injuries are either unpreventable (e.g., traffic accidents, heart attacks, violent acts) or are presently not covered by OSHA regulations. A study of only OSHA-regulated hazards in California showed a 20 percent reduction in injuries.[47]

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[44] Cong. Rec., p. S-19248 (Dec. 19, 1979) (remarks of Senator Schweiker).

[45] J. Mendeloff, Regulating Safety: An Economic and Political Analysis of Occupational Safety and Health Policy (Cambridge, Mass., 1979), p. 94.

[46] Final Report of the Interagency Task Force on Workplace Safety and Health (Dec. 14, 1978), p. II-7.

[47] J. Mendeloff, op. cit., p. 113.

Third, in the California study, increases in lost workday cases may be traced to increases in strains and overextensions. Similarly, while falls from elevations decreased, total falls and slips remained about the same. In view of higher workers' compensation benefits it may be theorized that some employees have "overestimated" their injuries.[48] Ironically, OSHA's premise of arousing employee concerns for workplace safety may have contributed to its own seemingly bleak evaluation.

Finally, the benefits of OSHA enforcement may not be presently quantifiable. For example, it has been estimated that the asbestos standard saves 1596 lives per year.[49] Yet, asbestos-related illnesses often have a latency period of 20 to 30 years. Thus, the impact of present enforcement efforts may not be realized statistically for many years.

C. Continued Complaints by Business About OSHA

It is difficult to debate the accuracy of Senator Schweiker's statement that OSHA is "the most despised Federal Agency in existence."[50] The agency is certainly not going to win any popularity contests.

It is difficult to assess whether OSHA's public image has improved as a result of its change in enforcement policy or to what extent OSHA remains unfairly burdened by its past abuses.

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[48] Ibid., pp. 113-116.

[49] Study on Federal Regulation, op. cit., p. 42.

[50] Cong. Rec., p. S-19249 (Dec. 19, 1979) (remarks of Senator Schweiker).

In a depressed economy and in an anti-regulation political climate, it is, perhaps, explainable why OSHA should remain the target of criticism. Unlike other regulatory schemes OSHA is: (1) pervasive--it applies to virtually every private workplace in the nation; and (2) intrusive--OSHA inspectors personally enter and inspect workplaces and require specific compliance measures, even without any evidence that existing conditions have caused injuries to employees of the inspected employer.

IV. THE DRAWBACKS TO S. 2153

A. General Criticisms

1. The Most Recent Changes in OSHA Need Time for Evaluation

The appropriations limitations for fiscal 1980 were signed on November 20, 1979 by President Carter and implemented by OSHA on January 1, 1980. These measures place limitations on enforcement against small employers in nonhazardous industries and prevent OSHA from conducting inspections within six months of inspections made under state plans. These provisions will join with other appropriations limitations (discussed in Part II) and administrative reforms to change the nature of OSHA enforcement. Prudence requires that these modifications be given time to take effect and to be analyzed before more radical and sweeping revisions are contemplated.

In slightly more than a year OSHA has implemented a major policy shift in allocating 95 percent of programmed inspections for high hazard industries. A new grant program for employee training and education has been started and new procedures for responding to employee complaints have been adopted. New initiatives should await the evaluation of these and other recent policy changes.

2. S. 2153 Would Turn OSHA Into an Accident Investigation Agency

The purpose of the Act is to prevent the occurence of workplace injuries and illnesses. If OSHA's authority to conduct inspections of over 90 percent of American workplaces is contingent on prior injuries and fatalities, OSHA will no longer be spending its time preventing deaths and injuries, but instead will be investigating accidents after they have occurred. Moreover, OSHA will have to spend a tremendous amount of time processing employer affidavits, which could be as many as 500,000 per year.

3. S. 2153 Would Encourage Inaction by Employers

Although, in theory, the 90 percent of employers that would be exempt from inspection would still be expected to comply with OSHA, in reality, this would not likely be the case. Exempt employers would be tempted to view OSHA's inability to conduct inspections as a moratorium on their compliance duties. These employers might be encouraged to take chances with employee safety, believing that only after an accident occurred could they be singled out for an inspection. Furthermore, the likely delays that would be caused by injury reporting through state workers' compensation bureaus to OSHA could mean that there would be long periods during which high accident rates were experienced but there still was no enforcement by OSHA.

4. S. 2153 Would Bring About Illogical and Unacceptable Results

Employers with a proven history of poor safety performance and a high accident rate would continue to be inspected. The problem arises with employers whose safety conditions change quickly from good to bad; this could result from a change in ownership, production methods, or other reasons. Only after a sufficient number of accidents had raised the rate to above the exemption level would the employer be inspected. Moreover, delays inherent in recordkeeping and reporting would further delay a timely OSHA inspection.

Employers with good safety records would fall into two classes. Those with no workplace hazards probably would not have been inspected anyway (under OSHA's hazardous industries program) and even if they were inspected, they would not be found in violation. The other group of employers is comprised of those that have workplace hazards but who have been fortunate in not having many prior accidents. Under S. 2153 these employers would not be subject to inspection until it was too late.

5. S. 2153 Is Inconsistent with the Congressional Intent of OSHA

Section 2(b) of the Act declares the Congressional intent of OSHA "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." The goal of OSHA is unqualified and applies to every employee, regardless of the size of the employer, the employer's industry, or the employer's past history of accidents.

If the implementation of OSHA has been inadequate, then it should be changed to better achieve the goal. The goal itself should not be compromised to accomodate perceptions of OSHA's past failings or its present enforcement capabilities.

B. Specific Criticisms

1. § 4A(a)(1)(A).

This section would permit inspections of otherwise exempt employers if there had been an accident resulting in the death of one or more employees or the hospitalization of one or more employees.

Under current OSHA regulations,[51] employers are required to report, within 48 hours of its occurrence, any job-related fatality or an accident requiring the hospitalization of five or more employees.

S. 2153 would mandate the amending of OSHA's recordkeeping regulation to require that all hospitalizations be reported. The result would be a drastic increase in paperwork and inconvenience to employers.

2. § 4A(a)(1)(C)

This section conditions the Secretary's right to inspect based on an unresolved employee complaint to instances where the

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[51] 29 C.F.R. § 1904.8 (1980).

Secretary has "reasonable grounds to believe a violation exists."

Following the Supreme Court's decision in *Marshall v. Barlow's, Inc.,*[52] the lower courts are in disagreement about the degree of probable cause needed to support the issuance of an administrative inspection warrant.[53] Even under the present administrative probable cause standard, where it is *not* necessary that there be a reasonable belief that violations are present but only that the employer has been selected for inspection based on a general plan drawn from neutral criteria, the Secretary has often had difficulty in obtaining warrants based on employee complaints.[54] By requiring a reasonable belief that violations exist, in effect a criminal law standard, it would be extremely difficult to obtain warrants.

3. *§ 4A(a)(3)*

This section would limit the scope of "special" inspections of exempt employers (*e.g.*, accident investigations, unresolved employee complaints) to the purpose of the inspection, but permits citations for other violations found during the normal course of the original limited inspection.

Based on this section OSHA inspectors would serve as accident investigators and would be precluded from conducting more comprehensive inspections to prevent the occurrence of a second accident elsewhere in the workplace. Furthermore, permitting the citation of "other observed violations" could lead to an unpleasant "cat-and-mouse" game between the inspector and employer and any citation issued for "other" violations almost assuredly will entail much litigation over the "plain view" doctrine.

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[52] 436 U.S. 307 (1978).

[53] See M. Rothstein, "OSHA Inspections After *Marshall v. Barlow's, Inc.,*" *Duke Law Journal* vol. 1979, p. 63.

[54] *See, e.g.*, Marshall v. Northwest Airlines, Inc., 587 F.2d 12 (7th Cir. 1978).

4. § 4A(b)

This section authorizes the delegation to state workers' compensation agencies the task of compiling workplace injury statistics for all employers each year and identifying to OSHA those employers that qualify for exemption.

The dismal record of state workers' compensation systems is well documented.[55] This is especially true with respect to recordkeeping and reporting of injuries.

> Barriers to the uniform reporting of basic work injury and compensation delivery information under workmen's compensatic include conflicts and voids in standards and procedures with respect to such critical areas as instruments for data collection, methods of information handling, and publication of reports.[56]

At the present time, state workers' compensation agencies lack the capability to produce uniform, consistent, accurate, and prompt data.

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[55] The Report of the National Commission on State Workmen's Compensation Laws (1972).

[56] J. Gordon and A. Akman, "Methods for Analysing the Costs and Benefits of Uniform Reporting Under Workmen's Compensation," Supplemental Studies for The National Commission on State Workmen's Compensation Laws (1973), vol. III, p. 129.

5. § 4A(c)

This section provides that employers not qualifying for an exemption based on workers' compensation data may be exempt if they file an affidavit stating that they had no fatalities in the last calendar year and their number of lost workdays was less than that prescribed in the Table in § 4A(c)(1).

Regrettably, this exemption provision must be viewed as encouraging the submission of fraudulent affidavits. Employers filing fraudulent affidavits are not subject to any penalties and are likely to go undetected. Even good faith errors in the filling of affidavits will be difficult to discover. Any auditing procedures to verify affidavits would further bury the Secretary in an avalanche of paperwork.

6. § 4A(d)(1)(A) and (B)

This section prohibits the assessment of penalties for serious and nonserious violations against exempt employers with 10 or fewer employees or larger employers that have an advisory safety committee.

The theory on which OSHA enforcement is based is that pre-inspection compliance can only be achieved if employers found to be in violation are assessed civil penalties. It is hard to justify assessing a penalty against an exempt employer with 11 employees and not assessing a penalty against an exempt employer with 10. The employees of both employers deserve the same safe working conditions which Congress believed would be encouraged by the assessment of civil penalties.

Prohibiting penalties from being assessed against larger exempt employers that have safety committees is not likely to result in increased employee protection. A committee with mere "consultation" power will afford employees no new rights; filing safety complaints and making recommendations to management are already protected activities under § 11(c) of OSHA and § 8(a)(1) of the NLRA. The likely result will be the proliferation of pro forma committees.

7. § 4A(d)(2)

This section provides that non-exempt employers having advisory safety committees may be assessed maximum penalties of only $700 for serious violations and only $300 for nonserious violations.

This provision is unnecessary. Under § 17(j), the Occupational Safety and Health Review Commission is required to consider an employer's good faith in penalty assessment. The Commission has consistently reduced or vacated penalties where employers have demonstrated a commitment to job safety and health, have established employee safety committes, or have held regular safety meetings.[57] OSHA regulations also provide for reductions in proposed penalties based on good faith.[58]

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[57] See M. Rothstein, Occupational Safety and Health Law (St. Paul, Minn., 1978), p. 329-331.

[58] OSHA Field Operations Manual Ch. XI-C-3-e, Ch. XII-E-19-d-2 (1980).

8. § 4A(f)(2)(E)

This section provides that if employees choose not to participate in an advisory safety committee, then the employer would no longer qualify for the penalty limitations described in § 4A(d).

As discussed above, these advisory safety committees are not likely to be of much value to employees, but they will be of value to employers. Giving employees a veto power over an employer benefit may well result in employee participation being used as a bargaining weapon by organized employees and as a retributive measure by unorganized employees. It is antithetical to the avowed purpose of the Act to put employees in a position where threatening to withhold cooperation over matters relating to their own safety and health may be in their economic best interests.

9. § 4A(g)

This section provides that an employer may also qualify for a § 4A(d) penalty limitation if the employer participates in a consultation program 1) approved by the Secretary, 2) offered by a workers' compensation insurance carrier that is professionally certified, or 3) provided by any other individual or private business meeting requirements set by the Secretary.

The expanded use of consultation programs should be encouraged, but this provision raises serious problems. According to the GAO Report on Workplace Consultation Programs (discussed in Part II) one of the worst features of the present system is that OSHA is unable to standardize the qualifications, training, and directions of the various consultation programs and OSHA has not been able to monitor their effeciency. S. 2153 would create an army of private consultants over whom OSHA would have little or no control. The consultant might recommend the use of one method of safety protection only to have an OSHA inspector come in with different requirements.

10. § 4A(h)(1)

This section requires that employers seeking an inspection exemption or a penalty limitation maintain records of injuries, workers' compensation records, documentation of its number of employees, minutes of advisory safety committee meetings, evidence of procedures used to select employee members of advisory safety committees, written reports of consultants, and other information. These recordkeeping requirements are in addition to existing OSHA, workers' compensation, and other recordkeeping measures. Obviously, this places an onerous and unnecessary burden on employers.

11. § 4A(h)(2)

This section provides that if the Secretary determines that a workplace does not qualify for a claimed exemption or penalty limitation, the Secretary shall notify the employer of such a ruling and the only review of this determination may be in the context of an enforcement adjudication before the Occupational Safety and Health Review Commission or on judicial review of the decision of the Commission.

Under § 4A(h)(1), the Secretary has a right of access to all exemption-related records and may conduct an inspection if he determines that the employer does not qualify for an exemption. Despite the "exclusivity" of challenges being made before the Commission, employers are certain to raise the exemption issue as negating probable cause to issue a warrant. An action to quash a a warrant might be brought in district court based on such a theory. The law is not settled on whether an employer may collaterally attack the validity of an OSHA warrant in district court or must exhaust its remedies before the Commission.[59]

If the intent of an S. 2153 exemption is to relieve employers of OSHA worries, this is not necessarily being guaranteed by this section. Even employers whose exemption is ultimately upheld will still have the inconvenience of an OSHA inspection and the expense of defending an enforcement action before the Commission and Court of Appeals.

Finally, the Commission's docket, already overcrowded, is likely to be further congested by numerous cases raising the exemption question because the impact of any Commission decision on an employer's exemption would be prospective as well as retroactive.

12. § 4A(h)(4)

This section provides that "notwithstanding any other provision of law," there is no civil liability for any consultant or safety committee member for any breach of duty, which allegedly results in employee injury or illness.

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[59] See M. Rothstein, op. cit. (1980 Supp.), § 224.15.

This section would abrogate the common law basis of liability in several jurisdictions for safety inspections conducted by workers' compensation carriers and labor unions.[60]

In Estate of Sabraw v. Michigan Millers Mutual Insurance Co.,[61] a fire insurer gratuitously undertook to inspect a feed mill for fire hazards. The inspector failed to notice the use of an industrial truck in the mill, which constituted an ignition hazard. When the truck's exhaust pipe ignited dust particles an explosion killed three employees and injured three others. In reversing the trial court's setting aside jury verdicts for the plaintiffs, the Michigan appellate court held that whether the insurer gratuitously undertook to inspect the mill for fire hazards was a question of fact for the jury and there was ample evidence of a breach of duty by the insurer. Therefore, the defendant insurance company was held liable.

In Helton v. Hake,[62] an action for the wrongful death of a worker was brought against the local labor union and the union steward. A trial court jury found for the plaintiffs, based on the union's negligent failure to perform a duty owed to the decedent under the collective bargaining contract. In affirming the trial court, the court of appeals held that usually a union assumes only an advisory role with respect to safety and health matters and is only charged with the duty of fair representation. In this case, however, the collective bargaining agreement provided that the union steward had responsibility for enforcing safety rules without interference from the employer. Therefore, the union assumed a heightened duty and was liable in tort for breach of the duty.

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[60] Ibid., § § 526,527.

[61] ____ Mich. App. ____, 274 N.W.2d 838 (1978). See Yoder Co. v. Liberty Mut. Ins. Co., ____ Mich. App. ____, 284 N.W.2d 810 (1979).

[62] 564 S.W.2d 313 (Mo. Ct. App.), cert. denied, 439 U.S. 959 (1978).

V. CONCLUSION

Despite commendable recent efforts, OSHA has a long way to go before it begins fulfilling the hopes and goals underlying the statute. S. 2153 would not help to realize these goals, but would limit the effectiveness of the Act and would indicate a retrenching in the commitment to employee safety and health.

Encouraging voluntary compliance with OSHA must be given a high priority. OSHA-administered direct consultation programs, expanded employee training programs, tax incentives for purchasing new safety equipment, and other measures must be explored. Other methods of enforcement and streamlining the adjudicatory process, both of which are beyond the scope of this Statement, are also essential to the effective implementation of the Act.

STATEMENT

on behalf of

THE EDISON ELECTRIC INSTITUTE

on

S. 2153 - OCCUPATIONAL SAFETY AND HEALTH
IMPROVEMENTS ACT OF 1980

before the

COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

April 25, 1980

The Edison Electric Institute (hereinafter "EEI") is the association of the nation's investor-owned electric utilities. Its members serve 99.6 percent of the customers served by the investor owned segment of the industry. They generate more than 77 percent of all the electricity in the country and serve more than 77 percent of all ultimate customers of electricity.

The EEI appreciates the opportunity to submit its views on S. 2153, the Occupational Safety & Health Improvements Act of 1980. The basic concept of the Bill, a safe workplace exempt from OSHA inspections is generally supported by EEI. However, we feel that some of the provisions of the legislation require alteration.

The Need For OSHA Reform

Ten years have passed since the passage of the Occupational Safety & Health Act. The original proponents of the Bill concede that "we can find little evidence that the Act has directly improved workplace safety".[1]

Data from the Department of Labor has proven that the Occupational Safety & Health Act has been ineffective in reducing the evidence of injuries and illnesses in the workplace.

Complaints have increasingly been directed to Congress to intercede and correct the Act's system of proliferating standards development and penalty oriented enforcement procedure. On the other hand, some organizations see even more stringent enforcement, and yet a freer hand for standards development in government, as the answer to the Act's ineffective performance. But it seems only a minority believes that more of the same medicine will provide the answer.

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[1] Statement of Senator Schweiker, Congressional Record Vol., 125, No. 183 December 19, 1979.

Achieving the Act's goal has been hampered by OSHA's inability to foster an environment of cooperation and coordinated effort between labor, management, and the government. The business community generally perceives OSHA's administration as directing little attention toward legitimate business concerns - a perception which lends to the creation of a conflicting situation displaying confrontation rather than cooperation. These factors, as well as OSHA's enforcement strategies and many of its policy positions, have weakened undertakings to produce safer and more healthful working conditions.

The past nine years experience with OSHA leads to the summarization that it is time to reevaluate the effectiveness of the government's approach to workplace safety & health.

S. 2153 would relieve employers with functional and effective safety programs from being subjected to routine, low priority safety inspections. In turn, more time could be devoted to improving and elaborating the present safety & health programs of many workplaces.

The Bill reflects important concepts which are supported by EEI. It acknowledges OSHA's past failures in worker protection and incorporates the idea that safety performance ought to be the proper means by which employees should be regulated under OSHA.

S. 2153 provides a performance standard to which employers are responsible for protecting their workers. The principal purpose of preventing injuries, not preventing citations, is re-established. Relief is provided for employers whose injury experience shows the presence of effective safety programs.

The performance exemptions proposed in S. 2153 would instill in employers a motivation to improve their safety performances and their efforts in safety would be recognized by OSHA. Using this concept, OSHA can more effectively allocate its resources to areas where they are most needed.

Simply stated, OSHA has not accomplished its stated objectives of reducing occupational injuries and illness and protecting the American work force.

There is little evidence that setting standards and enforcing compliance through inspections and penalties produces the desired result,[2] furthermore, there is no available data proving that OSHA has reduced the number of accidents or illnesses in the workplace.[3] The Act's objective of reducing occupational injuries and illnesses must not be overshadowed by allowing it to be misplaced in a design of penalties and inspections that may not best utilize the resources available to both OSHA and employers to carry out the Act's objective.

2/ More than 71% of OSHA's FY-1979 inspections - 41,269 resulted in not a single serious citation being issued. Repeat and willful violations were issued on 3.9% and 1% respectively. OSHA's Office of Management Data Systems (OMDS), March, 1980.

3/ Since 1971, the rate of serious injuries is up 25%. Department Of Labor's Bureau of Labor Statistics, April, 1980.

Suggested Amendments to S. 2153

While EEI supports the underlying concept of a performance based exemption set forth in S. 2153, some concern has been expressed regarding specific provisions of the Bill. We offer the following recommendations for consideration by the Committee in its deliberations on S. 2153.

S. 2153 provides a performance standard for employers with a good safety record that would relieve qualified employers from routine safety inspections. The Bill directs that safety inspections be based on employer's safety performance. Great care must be taken in defining a performance standard, to ensure that the performance standard is realistic. We are not suggesting that the exemption be easily obtained. Our concern lies in the present method of qualification.

Employers in industries having far differing degrees of industrial hazards must satisfy a universal measure of safety performance and compete for their exemption against employers in industries with few, if any, hazards. Thus, steel mills are compared to law firms. In order to stimulate the desired incentives for excellence, we recommend the Bill take account of the hazards encountered in each industry whose records demonstrate safety consciousness and an ability to cope with the hazards encountered. The Bill's exemption of employers in no or low risk industries is sound in that it eliminates unnecessary inspections. We recommend, however, that in addition, it would be more effective to exempt a specified percentage of employers having the best safety records in each industry. This recommendation would provide an incentive for all employers to improve their safety records, although not all employers would qualify for exemption as a result. Thus, only the safest would qualify but the effect would be to raise the standard for all.

We question the feasibility of using state workers' compensation data. A recommended alternative would be to utilize the current OSHA reporting program with modifications. Currently OSHA collects similar information from employers with more than 10 employees. Unfortunately, little has been learned from the information during the ten years the Act has been in effect. OSHA has not apparently assembled the material in a fashion that aids either standard development or OSHA enforcements.[4/] The current OSHA reporting program could be slightly modified, made more effective and expanded to include small employers who desire the exemption but are not exempted under the current Labor - Health, Education

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[4/] See, Report to the Congress of the United States by Comptroller General of the United States, General Accounting Office HRD 79-44, May 3, 1979. The Report stated:

> "The Department of Labor's Occupational Safety and Health Administration (OSHA) has information in its files on the causes of serious work-related accidents yet is not using this to develop measures to prevent accidents from recurring.
>
> Because of this, OSHA does not know
>
> --to what extent fatal accidents could have been avoided had safety and health regulations been enforced,
>
> --what standards need to be developed or revised, and
>
> --what violations cause death or serious accidents."

and Welfare Appropriations approach. A federal agency with the desire and expertise to do the collation should be selected for this task. The Department of Commerce, for example, collects, collates and publishes far more complex material. If this function is kept within OSHA, then congressional oversite to ensure effectiveness is needed. State involvement in the reporting could, therefore, be eliminated.

In conclusion, the concepts contained in S. 2153 are a step in the right direction toward the accomplishment of OSHA's goal. EEI appreciates the opportunity afforded by this Committee to state their views on S. 2153. We hope that the recommendations presented in this statement will be beneficial to the Committee in its deliberations on S. 2153.

ECOSH
Electronics Committee on Safety and Health
655 Castro Street #3 Mountain View, Ca. 94041
Phone 415/969-7218

April 11, 1980

Senator Alan Cranston
Senate Office Bldg.
Rm. 229
Washington, D.C. 20510

Dear Senator Cranston:

ECOSH is an alliance of electronics workers, lawyers and doctors working to improve health and safety conditions in the Santa Clara Valley. We have submitted testimony to you opposing the Schweiker Amendment because from our experience we believe it would set back workers to the sweatshop conditions of the turn of the century. OSHA inspections are the only recourse workers, and especially unorganized workers, have in the face of health and life threatening conditions. We urge you to withdraw your support from the amendment and work actively to defeat any further weakening of the OSHA act. We believe the compelling examples of Signetics and Raychems disregard for human life will prompt you to act in the interest of the majority of your constituents--the working people of California.

Sincerely,
Pat Lamborn
Pat Lamborn
ECOSH Sec.-Treas.

A Project of the Santa Clara Center for Occupational Safety and Health

Testimony of ECOSH, Electronics Committee on Occupational Safety and Health, in opposition to the Schweiker Amendment

ECOSH is a coalition of electronics workers and community and technical resource people. Since 1978 ECOSH has participated in an on-going struggle to clean up "Silicon Valley" where some 140,000 people toil daily in the manufacture of integrated circuits and other high technology work. This work entails exposure to some of the most hazardous solvents, acids, and gases used in US industry. The so-called OSHA Improvement Act of 1980, if enacted, would deal a terrible blow to the thousands and thousands of unorganized assemblers in Silicon Valley, which include a high percentage of non-English speaking women of child-bearing age.

To illustrate our point, we will focus on the experience of ECOSH in helping workers at the Signetics Corporation in Sunnyvale. Signetics is a wholly-owned subsidiary of the Phillips Corporation, the world's largest electronics company. While the particulars of the Signetics situation are perhaps unique, the overall picture and the lessons derived convince us that if electronics workers in Silicon Valley are ever to enjoy the benefit of a safe work environment, then the Schweiker Amendment must be defeated. Thus, under the amendment, an employer could gain automatic inspection from OSHA safety checks simply by filing a sworn statement asserting that in the prior year there were no employee deaths from occupational injury, and that lost work day injuries were under 2 per 100 employees. Signetics in Sunnyvale has about 4,000 employees and thus would be exempt if their statement attested to fewer than 80 lost work days due to job injuries. In the past several years this employer has had a problem with fume contamination, attributable to a fatally-flawed ventilation system. Among the casualties from this fundamental safety deficiency are three women who have become permanently sensitized to their environment and who find it extremely difficult to endure exposure not only to the toxic chemicals with which they used to work but also household cleansers, printers ink, pesticides, colognes etc. Moreover, the chemicals whose vapors have been detected in the contaminated air which circulated through their area include several known and suspected carcinogens, so these women and possibly other co-workers can look forward to the possibility of cancer later on.

What was Signetics' response to this tragedy? Well between 1977 and mid-1978 there was a flurry of "band-aid" activity. Then no further work. Instead, the three sensitized workers were placed in a company cafeteria where they sat eight hours a day, five days a week, for a year, doing no work yet receiving full pay. They were terminated in July of last year, days before a NIOSH medical team was slated to arrive in response to their plea for a Health Hazard Evaluation. As they fired them, Signetics gave as the reason the unavailability of work for them given their extreme disability. Yet to date these women have received not one cent of workers compensation because the company is excercising its right to dispute their injury. Moreover, by having kept them on payroll and on the premises for over a year Signetics avoided having to record more than twelve-hundred lost work days due to their occupational exposure. After firing them, and officially denying that there had been a job injury Signetics has again avoided having to report still further lost work days, which by now total over two thousand for these 3 women alone. This gross understatement of the true extent of occupational illness at this one facility goes to the heart of ECOSH's objections to the Schweiker amendment. In an unorganized workplace like Signetics, there are in fact no regulatory agencies but OSHA available to provide some sort of preventive maintenance of safe conditions and unorganized workers rely tremendously on the services of OSHA when faced with the life- and health-threatening hazards documented at Silicon Valley's hundreds of electronics plants.

Our concern was echoed by NIOSH, the National Institute for Occupational Safety and Health, in the course of its Health Hazard Evaluation of Signetics, begun in September 1979. As the investigative team wrote:

> Review of the OSHA logs for 1977, 1978 and 1979 revealed the following entries for "fume inhalation: for the Sunnyvale facility:
>
> | | |
> |---|---|
> | 1977 | 39 |
> | 1978 | 30 |
> | 1 Jan to 22 Aug 1979 | 10 |
>
> Many of the individuals for whom Signetics Accident Report Forms were filed (and of which the investigators are directly aware) were not listed in the OSHA log. In fact, for the ten employees whose records were examined but who were not interviewed, none of the numerous incidents which apparently led to the filing of Accident Report forms were entered in the OSHA log. Reliance on the OSHA log would not have alerted ...OSHA...to the existence of workplace-related health complaints at Signetics.
>
> --Interim Health Hazard Evaluation, submitted in its entirety as an exhibit to this testimony

Given this sort of evidence of underreporting of occupational injury and lost work time, ECOSH opposes any change in the law that would give employers still further incentive to understate the extent of job exposures and disabilities, incentive to cover up the true extent of workplace hazards and their consequences.

In the case of qualified employers, the amendment would bar penalties, except for "wilful" or repeated" violations, as long as the employer maintains an advisory safety committee and a regular consultation program. Signetics has had a safety committee for years. Its members have met, documented such clear and present dangers as phosphine and arsine leaks, grossly defective ventilation and exhaust systems, the use of toxins such as trichloroethylene and highly corrosive acids in poorly-ventilated environments, routine recirculation of contaminated "exhaust" air into assemblers breathing zones; outmoded, inefficient pollution control devices, gas cabinets not properly vented, incompatible storage of dangerous chemicals, and so on. Safety committee members have subjected themselves to toxic exposures in on-going efforts to get to the source of the fume contamination problem at Signetics and to eliminate it. When it became known by responsible company officials that there were fatal flaws in the ventilation system, when outside consultants recommended that it be fully revamped to prevent recirculation of contaminated air, and when safety committee members despaired of correcting a growing health and safety disaster and made list after list of recommendations, Signetics management opted not to revamp the ventilation system, not to replace inefficient and ineffective scrubbers, but rather to "wait it out." "Waiting it out" has meant ignored the recommendations not only of the safety committee and outside consultants, but also to cries and pleas of a growing number of seriously ill current and former employees, asserting that such complaints are unsubstantiated, and that the complainants are "hysterical," have a "problem" or have some supposedly devious motive in mind when they persist in seeking health and safety protection for themselves and their co-workers.

The catalog of unsafe and potentially horrendous conditions at Signetics is long and can only be summarized in a short statement.

For the benefit of the committee we have included a list of the several hundred fire safety hazards found at this location in September 1979 - the same month that NIOSH was uncovering the OSHA log scandal, and two years from the date that the fume contamination problem first gained notice. ECOSH and the affected workers at Signetics are very greatful to the local fire safety agency for its diligent work, but spot checks by local fire departments are not enough. Nor is it enough for OSHA to come in after their has been a fatality or a hospitalization. There are life-threatening, health-destroying conditions present in Silicon Valley every day, and the Signetics tragedy may turn out to be but the first in a series of terrifying examples of corporate indifference to worker health and safety in this booming, "high tech" industry.

The Schweiker amendment, if enacted, will remove from a group of very vulnerable, and very frightened electronics workers, one of the few tools now available to them to try to gain for themselves the right to a clean, safe workplace. The stakes are high, and industry has no doubt figured out the "cost benefit" analysis of keeping OSHA out of its affairs. The workers who are made the human guinea pigs want OSHA to be there, equipped to do the job that Congress gave the agency in 1970 and which is going to take a long time even under the best of circumstances. This is no time to make those circumstances worse, for the lives and health of thousands and thousands of electronics workers--to name only one segment of OSHA's beneficiaries--will be hanging in the balance.

STATEMENT OF THE
AIR TRANSPORT ASSOCIATION
TO THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
April, 1980
CONCERNING
OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENT ACT OF 1980 S. 2153

EXECUTIVE SUMMARY

The Air Transport Association representing virtually all of the scheduled airlines of the United States agrees with the objective of S. 2153 but believes that amendments are required in two areas. First, the proposal to use Worker's Compensation data to determine workplace safety would produce misleading information, at least insofar as airline safety is concerned, and an amendment is proposed. Second, the definition of what constitutes a "workplace" is critical to the provisions of the bill but the proposed definition is imprecise. Amendment to clarify this definition is recommended. The airlines would support the bill if the recommended amendments are adopted.

STATEMENT

The Air Transport Association of America, which represents virtually all of the scheduled airlines of the United States, welcomes this opportunity to comment on S. 2153, the Occupational Safety and Health Improvement Act of 1980. The airline industry is vitally concerned about the outcome of this proposed legislation since the industry employs more than 300,000 people, many of whom have been and are currently affected by the Occupational Safety and Health Act of 1970.

We are of the general opinion that S. 2153 would provide some notable improvements to the Occupational Safety and Health Act of 1970 if the amendments that we are proposing are adopted. Those incentives which are proposed to further encourage attainment of a no death/low-lost-work-day-injury rate and to establish advisory safety committees as well as advisory consultation programs would undoubtedly provide considerable assistance in developing higher levels of safety in the workplace. A most significant aspect would be the self-initiative efforts by employees through their support of safety committees to improve safety within their own span of control by thinking and practicing safe work methods and procedures.

Although we believe these foregoing improvements to be real and attainable, this bill nevertheless harbors two tenets which would have a profound adverse impact on the airline industry. The first and foremost of two areas with which we disagree is the methodology proposed in the bill (new Section 4A) which specifies that for purposes of identifying workplaces qualifying for exemption, there will be agreements developed between OSHA and State workers' compensation agencies to prepare and submit annually a listing of all employees with reported occupational injuries. Based on this listing, according to the proposed legislation, an employer may or may not be exempt from all safety inspections and investigations with respect to the workplace involved. If the employer does not so qualify, then an alternative route for exemption may be pursued whereby the employer submits an affidavit under oath stating, among other things, that the maximum number of lost workday injury cases have not been exceeded in accordance with an established table of comparisons.

In reviewing this first area, we are reminded of a statement in a Department of Labor publication entitled "What Every Employer Needs to Know About OSHA Recordkeeping" which states that "workers' compensation determinations have no direct bearing on recordability under OSHA. Some cases may be covered by workers' compensation but are not recordable; others may be recordable but are not covered by workers' compensation." Since an employee's lost workday record is based on a five day work week for OSHA and on either a shorter or longer work week under Workers' Compensation, depending upon the state concerned, there is no way to compare these records. Changing the means of recordkeeping at this time seems to serve no useful purpose and in fact may only foster confusion with the influx of additional government agencies or bureaus.

Based on past experience the airlines have already been subjected to what we consider to be an unjustified determination even with the current OSHA requirements for reporting injuries. In 1978, when the so-called OSHA "target industries listing" was promulgated it focused on a selected number of industries considered to be in the high risk category. One industry was "transportation" and included "certificated air transportation" under which the schedule airline industry operates. Although several sources were listed in an ATA letter to OSHA on April 3, 1978, (copy attached) documenting that the average lost time per injury (indication of severity) for the air transport industry was one of the lowest of all industries reported and that the airline industry ranks way below the national average of lost workdays per lost workday case, the airlines have yet to be specifically and categorically excluded from the "target industry" list. This occurrence however, in our opinion, did not condemn the current system for reporting injuries but only tended to emphasize that a more representative means was needed which would consider the severity and nature of injuries of an industry.

We believe that S. 2153 can achieve such a means provided the Workers' Compensation data consideration is excluded for the reasons specified earlier and recognition is made for the recently reported Bureau of Labor Statistics which show gradual improvement in the national industrial injury rate since 1973. This gradual improvement can be recognized by adjusting the exemption numbers downward to those levels which we recommend later in this statement. With these modifications, a major step will have been taken towards insuring that deserving employers qualify for the exemptions specified in S. 2153.

Our second area of disagreement is with the definition of the term "workplace" which, we think, needs further clarification in order to properly determine if a workplace is confined to a separate and distinct functional activity or whether a workplace might include a combination of dissimilar types of activities. Until proper clarification can be made, employers attempting to maintain a safety advisory committee and a regular consultation program as spelled out in the bill may find the demands monumental due to the number of safety committees required at a single physical location where business is conducted or where services or industrial operations are performed.

If it is the intent of the Committee to consider and recommend changes to S. 2153, the following specific changes to those sections of the bill pertaining to qualification for exemption and identification of workplace are offered:

Section 4A(a)(1)

Delete "or (c)" after "provisions of subsection b."

Section 4A(4) (Change to read)

"(4) As used in this section, the term 'workplace' means a single physical location where business is conducted or where services or industrial operations of a like nature are performed."

Section 4A(b) (Change to read)

"(b) For the purpose of identifying workplaces which qualify for the exemption provided in subsection (a), each employer shall comply with Section 8(c) of the Act whereby he shall make, keep and preserve, and make available to the Secretary or the Secretary of Health, Education, and Welfare, such records regarding his activities as prescribed by regulation. If during the preceding calendar year the workplace has no employee deaths caused by occupational injury and had a number of lost workday injuries which was less than or equal to the number specified in the following table, that workplace qualifies for an exemption:

Number of Employees of the Workplace, and Number of Lost Workday Injuries:

1-14	0
15-25	2

26-49	4
50-99	8
100-149	12
150-249	20
250-349	28
350-449	36
450-649	52
650-999	80

1000 and over, Eight injuries per every 100 employees.

For purposes of this paragraph a lost workday injury shall be any occupational injury which results in two or more lost workdays and the number of employees of the workplace shall be the average number of fulltime employees (or their equivalent) during the preceding year. No sooner than three years after the effective date of this section, and at three year intervals thereafter, the Secretary shall have the authority to revise the above table, within comparable standards, based on changes in the national average occupational injury lost workday case rate, and consideration of individual industry experience with regard to severity and nature of the injury as published by the Secretary."

Section 4A(c)(1)

Delete.

Although of less significance insofar as having an impact on the airline industry, we nevertheless wish to make several general comments to other sections of the bill as indicated in the following:

Safety Advisory Committees and Consultation Programs

It is suggested that Sections 4A(d)(1)(A) and 4A(d)(1)(B) be deleted since it is felt that an employer with a safety record that has earned an exemption, should not be required to maintain the additional administrative burden of a safety advisory committee and a consultation program in order that the employer not be assessed a penalty under most circumstances. However, for those employers which do not qualify for an exemption, we agree that the safety committee and programs will encourage accident prevention by increasing employee involvement and improve working conditions both from a safety as well as a health standpoint.

Serious Safety Hazards Definition

In Section 4A(a)(2) the term "serious safety hazards" is used. We are of the opinion that the definition of a serious safety hazard should be clarified in order that industry can more readily understand where OSHA wants action taken with respect to hazards.

Serious Workplace Accident Definition

In keeping with the Occupational Safety and Health Act of 1970 reporting requirements, it is suggested that the definition be changed to read, ".....or hospitalization of more than five employees."

Employee Participation on Safety Advisory Committee

In the event differences would develop between employees elected to participate on the safety advisory committees and management after which the committee dissolves, then the employer loses the penalty limitation and the employees are without a communication channel to management. There should be provisions in the bill which allow resolution action to be taken in such situations.

In conclusion, the airlines believe this legislation will not offer significant advantages to the industry unless the foregoing recommended actions are taken, particularly with regard to changing the qualifications requirements for exemptions and clarification of the definition of workplace.

Air Transport Association ata OF AMERICA

1700 New York Avenue, N.W.
Washington, D. C. 20006
Phone (202) 872-4000

CLIFTON F. VON KANN
Senior Vice President
Operations and Airports

April 3, 1978

Dr. Eula Bingham
Assistant Secretary
Occupational Safety and Health Administration
200 Constitution Avenue, N. W.
Washington, D. C. 20210

Dear Dr. Bingham:

The Air Transport Association of America, on behalf of its twenty-four (24) scheduled airline members (Attachment 1), would like to bring to your attention the concern of the airlines in regard to the so-called OSHA "target industries listing," which we understand was established to focus OSHA's efforts on industries which offered the greatest potential for improvement in occupational safety and health. The current "target industries listing" includes "transportation," which in turn includes "certificated air transportation" whether by intent or not. In the airline opinion, this inclusion is not in keeping with the newly stated objective of OSHA on "return to common sense priority." We request that the "target industries listing" be reviewed and that the "certificated air transportation" category be specifically excluded.

As it is understood, the "target industries" listing was initially developed and is updated from data compiled by the Bureau of Labor Statistics on occupational injury and illness incidence rates, such data being based on lost workday cases which OSHA considers to be a measure of the severity of injuries. The airlines are of the opinion that such data does not accurately reflect the low risk of severe injuries or the number of health hazards within the certificated airlines for the following reasons:

(1) As shown in the attached data (Attachment 2) for year 1976, compiled by the National Safety Council and published in their latest booklet entitled, "Work Injury Rates," the average lost time per injury (indication of severity) for the air transport industry was one of the lowest of all industries that were reported.

(2) This same data indicates that the air transport industry ranks among the highest in numbers of lost time injuries. However, we feel this is due primarily to the procedure whereby airlines provide full pay for an employee during the period of lost time injuries, a procedure which we understand is not customary in the vast majority of other industries. In fact, most state workman's compensation laws do not permit payments to be made for the lost time injury until the employee has been absent for an established period of time [normally five to seven days and even then the sum of payments is significantly limited (approximately $100.00 per week)]. As stated in the attached excerpt form from an American Airlines contractual agreement (Attachment 3), an airline employee will receive the difference between his base pay and the assigned workman's compensation payments. Furthermore, payment is initiated from the onset of the injury. Thus, if an airline employee experiences an extremely inconsequential-type injury (mild strain or cut) it would behoove him to lose time from work due to the fact he would receive total remuneration of salary benefits.

(3) Further, as shown in Table 4, "Number of Occupational Injuries and Illnesses, Private Sector, by Industry, United States, 1975" (Attachment 4) extracted from Bulletin 1981 of U. S. Department of Labor, Bureau of Labor Statistics 1978, transportation by air industry, ranks way below the national average of 17 average lost workdays per lost workday case with an average of only 12 days.

(4) As indicated in the attached airline report (Attachment 5) entitled "Disabling Injuries," the majority of lost time injuries is attributable to strains, sprains, bruises and aerotitis (blocked ears), the second most frequent disability for airlines. Aerotitis, even in its mildest form often causes airline flight personnel to forego their duties on the aircraft because of a slight head cold which might cause ear damage if they were subjected to the pressure changes associated with every flight. Instead of losing accrued sick time, time lost with aerotitis related colds is classified as being injury related.

(5) Cuts, sores and other injuries of this nature including gastrointestinal disturbance cases may necessitate both ground and airborne employees (e.g., flight attendants) to be suspended from their duties if such duties require the handling of food. This action is necessary due to established health regulations as specified in the Food and Drug Administration Regulations under Part 1250 - Subpart B, Land and Air Conveyances and Vessels "Paragraph 1250.135(b) (21 CFR 1250.135(b))" which reads

> "Any person known or suspected to be suffering from gastrointestinal disturbance or who has on the exposed portion of the body an open lesion or an infected wound shall not be permitted to engage in the preparation, handling or serving of food or beverages."

In view of the foregoing, the airlines are convinced that the air transport industry is not a high risk industry as indicated in the Bureau of Labor Statistics and therefore should not be considered as a candidate upon which OSHA plans to primarily focus its inspection efforts. As the above indicates, the risk of severe injuries is low. For OSHA to target the airline industry for frequent inspections, needlessly dilutes the agencies' resources. Accordingly, it is requested that the air transport industry be specifically excluded from consideration on the OSHA "target industries listing" for more frequently inspected industries. We would appreciate your favorable consideration of this request. If you should wish to discuss this matter further, please consider us available at your convenience.

Sincerely,

Clifton F. von Kann

Clifton F. von Kann
Senior Vice President
Operations and Engineering

Attachments

TESTIMONY BY THE MASSACHUSETTS COALITION FOR OCCUPATIONAL SAFETY AND HEALTH (MASSCOSH) ON "THE OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980" (S. 2153).

U.S. SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES.

APRIL 15, 1980.

We stand categorically opposed to S. 2153 and all other such attempts to weaken OSHA. This so-called "Improvements Act" represents no improvement for the worker. In fact it would abolish job safety rights for a substantial percentage of our membership, 27 local unions representing over 20,000 workers throughout Massachusetts and southern New Hampshire.

Ten years ago the Occupational Safety and Health Act declared unequivocally that no American working man or woman should have to risk "diminished health, functional capacity, or life expectancy" to earn a living. Today there are those who would qualify that right with the phrase, "unless the employer maintains a 'good safety record.'"

90-94% of the nation's workplaces, according to S. 2153's sponsors, would fall into this exempted category if the legislation is enacted. In theory OSHA standards would still apply. But in practice this law would prohibit OSHA from enforcing them, leaving workers at the mercy of management's "voluntary self-initiative" to maintain a safe workplace.

Senator Schweiker and his co-sponsors claim OSHA has not significantly reduced occupational injuries. Yet instead of seeking to improve enforcement of safety standards, increase OSHA's budget, or hire more inspectors, they would drastically cut back the Agency's authority. Senator Schweiker proposes to make "regulation more cost-effective by prioritizing inspections on detectable serious violations and high injury rate firms"--not an unreasonable idea, nor a new one either. OSHA has already taken steps in this direction, which require no change in the law. What is unreasonable in the extreme is the Senator's conclusion that prohibiting OSHA's enforcement of safety standards for 90% of U.S. injury will improve compliance or cut injury rates.

--A Modest Proposal--

Would Congress consider this approach in any other field? Why not, for example, declare traffic laws purely advisory at all but the 10% of Washington, D.C.'s intersections determined "most hazardous" from last year's accident rates? Drivers' "voluntary self-initiative" would be "stimulated" to improve safety at the remaining 90%. First, police would be banned --except to investigate fatal crashes. Second, all who passed a driver's ed course would be exempt from fines, no matter what they did. This "incentive" approach may sound unorthodox, but who can argue that strict traffic regulations have reduced accident rates? And after all, the police are among the most "despised" public employees, especially when they hand out citations, waste citizens' time, and do so at high cost to the taxpayers. Undoubtedly the current system is inflationary to boot.

Fortunately those who profiteer from the carnage on our highways currently constitute a weak lobby. Not so for the proponents of S. 2153, who chafe at the high, "non-productive" costs of safety innovations and engineering controls. No wonder business finds OSHA "illegitimate," "despises" it most of all Federal Agencies, and is left with a "bad taste" in its mouth, to quote Senator Schweiker. Business has maligned and ridiculed OSHA since its inception for the trivial scope of its concerns (nearly always involving the regulation of toilet seats), but dreads OSHA not for its shortcomings but for its strengths in regulating safety and health. Effective accident prevention costs money, more money than business will pay "voluntarily" or through "self-initiative."

--Statistical Sophistry--

Unable to destroy OSHA by frontal assault, its opponents now take a more devious approach: attack its "ineffectiveness" and "improve" it to death. If OSHA's enforcement is irrelevant to job safety, why not give business incentives to take over this function and regulate itself?

S. 2153's backers say that because lost-time accidents rose 28% from 1972 to 1978, OSHA is clearly not doing its job and a new approach is warranted. Here we have the classic example of working backward from a desired conclusion to find supporting evidence. No questions are asked about whether accident reporting has improved over the years in question; whether OSHA's budget of less than 3¢ per worker and staff of an inspector for every 60,000 workers are adequate to the enormous tasks of safety and health regulation; nor whether safety regulations, largely relics from the days of industry's "consensus standards," need revision.

According to a study by former Cal/OSHA inspector John

Mendelhoff (*Regulating Safety*, MIT Press, Cambridge, Mass., 1979), only 5-10% of lost-time injuries in manufacturing result from OSHA violations that would be detectable during a routine inspection. He finds, however, that OSHA has had a modest but real impact in reducing those types of accidents which are covered by OSHA standards: those that catch workers in or between machines, result from electric shocks, cause eye injuries, and to a lesser degree, occur due to slips and falls. Mendelhoff estimates that OSHA's efforts prevent 40,000-60,000 lost-time injuries annually and 300-500 fatalities.

The so-called "Improvements Act" would wipe out these advances and set back the cause of occupational safety and health a decade or more. We want to present a few of our many objections to this legislation, based on our experiences.

--Workers' Complaints Ignored--

Under S. 2153 workers' right to initiate an OSHA safety inspection would be effectively voided at exempted workplaces. OSHA would first be required to inform management of the complaint and could not conduct an inspection if management provided "satisfactory assurances that appropriate action, if any (had) been taken to correct the violation." This would mean that:

a) management would be forewarned about a possible OSHA inspection, contrary to Sec. 2(b)(10) of the OSH Act; and

(b) it would have legal grounds to bar OSHA by claiming its assurances "satisfactory" and could tie OSHA up in expensive and time-consuming litigation over this vague language.

Workers, meanwhile, would be left with no remedy from OSHA to deal with the hazardous condition. (Management would even have legal ground to stand on in barring or delaying "imminent danger inspections.)

35% of all OSHA inspections last year were initiated by worker complaints. In our experience these were more likely to result in citations for serious and significant hazards than were routine, unsolicited inspections. The latter more often turned up non-serious (and easily detectable) violations, often involving housekeeping. By eliminating workers from the enforcement process, S. 2153 would eliminate those with the most intimate knowledge of daily safety problems, not to mention the highest stake in seeing them corrected. Worker safety training has improved significantly in recent years, under the auspices of OSHA New Directions grants to unions, COSH groups, and others --another factor in the high "productivity" of worker-initiated inspections.

S. 2153 would squander this resource. The bill's sponsors purport to make OSHA more efficient by concentrating its resources where they are most needed. Yet they would strike from the OSH Act probably the single most effective path of OSHA enforcement.

Worst of all, a deterrent to the flagrant violation of standards would be removed, if workers lost the right to call in OSHA. Many employers already go to great lengths to prevent workers from learning their rights under OSHA or exercising them. Their tactics range from refusing to post public notice of employee rights to active intimidation of workers who would file complaints. Two recent incidents at foundries in our area illustrate the problem:

a) Wollaston Alloys, Inc. of Braintree, Massachusetts last year prevented OSHA inspectors (armed with a warrant) from privately interviewing employees about hazards at the plant. Later the company successfully defended itself against a contempt motion brought by OSHA in Federal District Court, where a judge ruled the warrant not specific enough to justify this phase of the investigation.

b) When a Springfield, Massachusetts firm attempted the same tactic early this year, the local union there attempted to arrange for workers to speak with OSHA off company property. But management was well versed in the tactics of obstructing OSHA through a course taught by a former Commissioner of the Occupational Safety and Health Review Commission. It managed to intimidate employees so effectively that none would consent to be interviewed. (Shortly afterward, a ladle of molten metal fell from a crane at the plant, barely missing several workers.)

S. 2153 would substitute the "good faith" efforts of such employers--if they claim a "good safety record"--for workers' right to a timely response to their safety complaints.

--Incentives for Violation--

While lost-time injuries would not decline under S. 2153, the reporting of these injuries would. Exemption from OSHA safety regulation would indeed be a powerful incentive for employers--not to hold down accident rates, but to cover them up.

We already encounter substantial under-reporting in the Massacusetts workers' compensation system. Attorneys tell us that first reports of injury are routinely neglected by many employers, and the $100 penalty for this practice has not been imposed in recent years. The law is simply not enforced in Massachusetts, and we have no reason to believe other states' performance differs substantially.

To rely on workers' compensation statistics, therefore, indetermining which workplaces are "safe," would reward unscrupulous employers. Worse, it would provide an added incentive to challenge workers' legitimate claims. The Massachusetts Division of Industrial Accidents is currently understaffed, underfunded, and overwhelmed by its caseload. Although the state's compensation statute requires the initial conference on a claim within 28 days after it is filed, the average wait is 3 months in Boston and 6-9 months in the rest of the state. Then another 6-9 months usually elapse before the formal hearing; thus a 1½ year delay in the final disposition of routine claims is not unusual. Challenges inspired by the chance of exemption from OSHA scrutiny would further overload inefficient state compensation apparatuses in Massachusetts and elsewhere.

Finally, employers would intensify pressure on injured workers to remain on the job, so as to avoid recording a "lost-time" accident. Under today's insurance coverage, which sets rates indirectly by industry averaging, management's incentive to challenge workers' valid claims is slight compared to what it would be under S. 2153. To the extent this practice does go on now, the results are devastating to workers too disabled to work but denied benefits while their cases are being processed. They find themselves forced to choose between working wounded or suffering severe financial hardship. S. 2153 would certainly increase the scale of these injustices.

--An Administrative Nightmare--

Like most other state compensation systems, the Massachusetts Division of Industrial Accidents is thoroughly unprepared to provide accident statistics by individual employer. Records are filed by claimant and are not computerized or coded by employer in any way. Budget cutbacks in 1976 totally wiped out the Division's statistical section.

Such chaos would ensue in the first year of S. 2153--with OSHA forced to deal with 50 different systems of recordkeeping (or non-recordkeeping)--that it would have to rely heavily on affidavits submitted by each employer. Picture, if you will, OSHA offices deluged with affidavits from as many as 5 million workplaces, all alleging a "good safety record." Verification would practically require the creation of a new Federal agency. But under the "Improvements Act," OSHA is supposed to handle it. To get an idea of the dimensions of the job, let's assume that a minimal effort to verify each affidavit would require:

a) a visit to the workplace for a cursory look at accident records;

b) consultation with union representatives or workers about the company's records; and

c) a check with whatever state compensation records are available.

By a conservative estimate, we'll say the process would take 3 hours of an inspector's time. With the current staff of 1500 OSHA inspectors working a 40-hour week, the whole thing could be finished in a mere 5 years--not allowing for coffee breaks, of course, not to mention health or safety inspections. (Even if using the state compensation records worked perfectly and exempted 85% of employers, leaving only 9% to file affidavits, as Senator Church has predicted, verification would still demand 900 hours of each inspector's time, or roughly 5 months work.)

It is hard to take seriously the claims of Senator Schweiker and his co-sponsors that they seek a more streamlined OSHA under S. 2153. Their bill would necessitate a drastic diversion of resources away from health and safety enforcement and towards paperwork, litigation, and investigation of the "safe workplace" exemption. Enacting this bill would commit more time and money to looking out for "management rights" than to protecting worker health and safety.

The only additional appropriation proposed would provide $5 million to state workers' compensation agencies to get their records in order (a relatively low figure, considering the need to institute computerized recordkeeping in most states). For that amount OSHA could hire an additional 250 inspectors, 20% more than it has today. Or it could fund 100 New Directions grants for $50,000 each to promote worker education on occupational safety and health.

Those same industry voices who complain of endless regulatory red tape apparently see it as beneficial when it can be used to tie up OSHA.

* * * *

Finally we want to present a look at what the passage of S. 2153 would mean practially for one of our member locals. Two safety and health consultants for Local 201 of the International Union of Electrical, Radio, and Machine Workers (AFL-CIO) in Lynn, Massachusetts have prepared the following comments.

--A Case Study of S. 2153's Potentially Disastrous Effects--

The Health-Technical Committee of MassCOSH includes several occupational health and safety professionals who provide technical and educational services to labor organizations throughout the state. One of the local unions in Massachusetts with which we have had extensive experience is IUE Local 201 which has about 8,500 members who work for the General Electric Company manufacturing jet engines, steam turbines, and electrical instruments. The Health-Technical Committee has worked with the Health and Safety Committee of this Local since 1976 and in 1978 the Local's committee applied for and received a "New Directions" training grant from OSHA. This grant allowed the committee to hire a full time professional staff and provide occupational health and safety education and services to Local 201 and other workers on the north shore of Boston. We members of the Health Technical Committee of MassCOSH and the full time professional staff of the Health and Safety Committee of Local 201 wish to register our strong opposition to the OSHA Improvements Act of 1980, S-2153, sponsored by Senator Richard Schweiker and others and offer the following statement in support of that opposition.

The General Electric Company on the North Shore would most certainly be considered a "safe" workplace ~~and~~ according to the Schweiker bill formula and thus would be exempt from inspections. From our vantage point, we think the formula for exemption is seriously flawed and that any exemption from inspections would seriously hamper the efforts of Local 201 to make this workplace safer.

1. The formula itself is flawed because there are many jobs and areas of the GE plants that would have to be considered low hazard areas -- clerical, planning, engineering, and management,

for example. These areas would be included in the employee count and could be as high as one third of the total employment at this location. Thus "passing" the test of fewer than 2 lost time accidents per hundred full time employees could just as easily result from the number of employees in relatively hazard-free areas as it could from the number of lost time accidents. As a measure, it simply does not give an adequate picture of the seriousness of the safety problems at any plant, this one included. The remainder of the facility consists of heavy fabrication and machining, which are relatively high hazard areas. The various machining, welding, and materials handling operations have produced many serious injuries yet the effect that these injuries would have on the Schweiker forumla would be diluted by lumping them together with the employees in safe areas. Employees in high hazard areas would be denied the right to call for an inspectio simply because of the number of workers in low hazard areas, clearly an absurd situation.

2. The S-2153 exemption is based on the previous year's record of injuries. In these times of rapid technological change (and GE is at the forefront of much of this change), this procedure would not be rapid enough to detect and correct new hazards that are discovered. Moreover, accidents with new machinery frequently happen soon after it is introduced. This one year lag clearly goes counter to the basic purpose of the OSH Act and the code of ethics of health and safety professionals, which is the prevention of occupational injuries and disease.

3. The bill creates a level and type of injury which is considered "acceptable" -- two or fewer lost time accidents per 100 full time employees. Simply having such a formula is further contrary to the purpose of the Act and contrary to some of the basic foundations of the country. The Act's purpose is to provide for

safe and healthful workplaces for every working man and woman in the nation. This purpose is based on a recognition of each individual's rights to equal protection under the law regardless of what kind of job they have. As a matter of justice, how can we accept as a policy decision any level of severity of injury more than zero?

4. An injury which results in two or more lost workdays is not a trivial injury. It is a common practise in industry to bring seriously injured workers into the plant and pay them, even when they cannot work, to avoid recording a lost time injury. This practise occurs at this plant, is encouraged by raised compensation payments associated with high accident rates, and would be further encouraged by S-2153. OSHA itself recognized this problem and requires employers to record days of restricted work activity (time at work but away from regular job) as well as lost workdays. S-2153 does not address this issue, and leaves the door open to further abuse.

5. The General Electric's compensation insurance carrier is Electric Mutual, a wholly-owned subsidiary of the GE. It is clear from past experience with Electric Mutual that their motives and goals are the same as those of GE. Their operation is characterized by denied claims, delayed payments, and other harrassment tactics designed to "starve employees back to work." The operation of this insurance carrier has been so intolerable that the officers of Local 201 have picketed the insurance office for better service. It is a further travesty to see that S-2153 would permit this insurance carrier to serve in an official consulting capacity to GE.

Any exemption from inspection would also seriously hamper the efforts of Local 201 to make this workplace safer. Although the Health and Safety Committee of Local 201 has bot been recognized by the company (and there is no joint labor-management committee), it has been very active. The New Directions program has allowed the committee to have a full time professional staff and a recent NLRB settlement agreement permits the union to bring these professionals into the plant to investigate health and safety problems. Other activities have provided education and services on a variety of health and safety issues to the Local 201 membership. All of these activities have been aimed at solving our own health and safety problems through traditional labor-management channels.

While we have been successful at solving many of our health and safety problems, OSHA has played a vitally important role in assisting the Local in requiring that the company make the workplace safe. For example, in a recent case , complaints about improperly guarded access routes to overhead cranes were not acted on by the company and an OSHA complaint was filed. OSHA agreed that the situation was serious, cited the company for two serious violations, and proposed a fine of $850. No one had been injured by the hazardous condition, but someone could have been and hopefully, that injury or death has been prevented. This inspection would never have occurred under S-2153.

The union is interested in solving its own problems, wants to use OSHA sparingly, but feels that it is essential to have some authority in the area of employee health and safety in order to balance the authority of the company at the workplace. S-2153 would destroy that balance.

OSHA got off to a poor start in 1971. The agency was staffed with bureaucrats who trained nit-picking inspectors and was handled by business-oriented administrators who were interested in managing OSHA's authority. But recently, the agency has been turned around.

Dedicated professionals in administrative positions, emphasis on health hazards, a revised employee complaint procedure, a "worst first" inspection priority list, a "common sense" approach, more training for compliance officers, national emphasis programs for high hazard industries, more emphasis on standards development, more cooperation with NIOSH and more changes have created an agency capable of doing what it should have done 9 years ago. These are positive improvements which have addressed many of the criticisms of OSHA that have led to S-2153. This bill would destroy much of this progress; it would be a giant step backwards. While OSHA is not the complete answer to our health and safety problems, it must be preserved and strengthened, not emasculated as S-2153 would do.

Massachusetts Coalition for Occupational Safety and Health
120 Boylston St., Room 206
Boston, Massachusetts 02116

James W. Crawford

James W. Crawford
Chair, MassCOSH Committee to Save O.S.H.A.

Nancy Lessin

Nancy Lessin
Staff, MassCOSH

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DEPARTMENT OF POLITICAL SCIENCE (Q-060) LA JOLLA, CALIFORNIA 92093

April 4, 1980

Mr. Mike Goldberg
Senate Human Relations Committee
Dirksen Senate Office
Washington D.C.

Dear Mr. Goldberg:

I am primarily responsible for the recommendations concerning OSHA's targeting strategy in the report of the Interagency Task Force on Workplace Safety and Health. Underlying those proposals was an attempt to improve both OSHA's effectiveness and its efficiency by finding feasible ways to prevent more injuries without incurring unreasonably heavy extra costs.

I believe that the Schweiker bill, which incorporates several of the Task Force's proposals, was written with similar objectives in mind. Criticisms that it would dismantle OSHA are clearly not justified. OSHA needs to do a better job with respect to both effectiveness and efficiency.

Nevertheless, I think that it is very difficult to specify legislatively how OSHA should target inspections. The targeting formula in the Schweiker bill may be superior to OSHA's current formula, but it requires data that is not currently available on a national level. Moreover, much better targeting formulas are available. (Some are described in the enclosed article.) Why not experiment with them in states where the needed data are available and rigorously evaluate the results?

Also, for reasons explained in this article, I believe that an expansion in the number of accident investigations is essential if OSHA is to gain a better understanding of the relation between violations and injuries. The latest version of the bill that I have seen would preclude any expansion because it forbids investigations except in the case of fatalities and catastrophes. Allowing investigations in cases involving "hospitalizations" (as California allows) would meet this objection.

If I can be of any assistance, please let me know.

Sincerely,

John Mendeloff

John Mendeloff
Assistant Professor

Making OSHA Enforcement More Efficient and Effective

John Mendeloff

For over a decade economists have berated politicians for adopting safety and environmental policies that rely on "command and control" strategies rather than on more efficient strategies to directly alter financial incentives. Yet, if they are to have more success in incorporating efficiency concerns into policies in these areas, analysts will need to adopt new, more subtle and indirect approaches. As Council of Economic Advisors Chairman Charles L. Schultze has complained, "not much thought has been devoted to dynamic strategies that, step by step, mesh a dwindling reliance on regulations with a cautiously expanding use of the market."[1]

Recently some proposals addressing Schultze's challenge have been made to the Occupational Safety and Health Administration (OSHA), the agency which has probably taken more criticism than any other for alleged overregulation. The proposals were included in the Final Report of the Interagency Task Force on Workplace Safety and Health -- a unit officially chaired by Secretary of Labor Ray Marshall and OMB Director James McIntyre.[2] Schultze can actually claim partial credit for these proposals because he, along with Bert Lance and Stuart Eizenstat, co-authored a letter requesting the President to establish a group to study ways to substitute economic incentives for the less efficient enforcement of safety standards. Organized labor vehemently objected, and Schultze and the others were able to salvage their proposal only by relabeling its mission; economic incentives were to be examined as possible supplements to the existing regulatory framework,

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[*] John Mendeloff teaches policy analysis at the University of California at San Diego and is the author of Regulating Safety (MIT Press, 1979). He served as a consultant to the Interagency Task Force for Workplace Safety and Health.

rather than as substitutes. In calling for substitution, Schultze had contravened his own counsel for modest changes. Following his advice, the Task Force suggested the following strategy:

1) When the enforcement of standards might not provide the best regulatory program, but

2) political realities require its use,

3) analysts may be well-advised to design the system for enforcing standards to stimulate the operation of a tax or other direct financial incentive.

OSHA's Problems and Prospects

Before explaining how the Task Force proposed to simulate an injury tax, some background on OSHA and its problems must be presented. Employers and economists have charged that OSHA constitutes an unnecessarily costly method for preventing injuries; organized labor has joined them in complaining that little success in preventing injuries has been achieved.

OSHA's inefficiency arises primarily because it specifies exactly what safety measures employers must adopt, rather than raising the costs of injuries and allowing employers to choose what preventive measures to take. Presumably, employers would search for the least costly ways to prevent injuries. In some cases OSHA may understand the social costs and benefits better than employers do, but these cases are likely to be exceptional. Moreover, many effective safety measures are beyond the reach of standards. For example, emphasizing safety records in promotion decisions for foremen might be a potent force for safety. Another reason for the inefficiency of the standards approach is that most injuries are not caused by violations of standards; undoubtedly many of the injuries that could be prevented at least cost are within this group.[3] This limitation is especially important because many of the violations that do cause injuries are momentary lapses in procedures which OSHA inspectors are unlikely to detect on routine inspections. The proportion of all injuries caused by detectable violations could be as low as 5% to 10%.

These conclusions should warn us not to expect enormous reductions in injury rates from OSHA's work. However, the prevailing opinion that OSHA has had no effect on injuries is contravened by the two most careful evaluations, which both suggest that reductions of a few percent can be attributed to OSHA.[4] Because each one percent reduction represents several hundred million dollars in injury costs, even small gains deserve attention. However, estimates of the costs of OSHA's safety program are so uncertain that reasonable judgments about the net benefits are not possible.

What lessons should we draw from this assessment? First, despite uncertainty about the net benefits of OSHA's performance, there are strong reasons for believing that the enforcement of standards is not the lowest cost strategy for preventing injuries. Second, because of the limited proportion of injuries caused by detectable violations, OSHA may actually have achieved a significant part of the potential of its current approach.

Directions for Change

Where we go from here depends partly upon the relative emphasis we put on effectiveness and efficiency. Focusing on the former, unions can correctly claim that a tripling of fines would probably lead to at least some added compliance with standards. But given OSHA's political weakness, that change is infeasible. An expansion of the inspectorate would run afoul of budgetary constraints. Moreover, assuming that both employers and OSHA have behaved with a modicum of rationality, these steps would involve higher compliance and inspection costs per injury prevented. Focusing on efficiency, businesses can argue that OSHA should speed up its attempts to junk nitpicking standards and transform specification standards into more flexible, performance standards. However, one man's nit is another man's lifesaver, and OSHA usually lacks the information needed to identify which is which.

Caring about both costs and effectiveness, a reasonable, but not unassailable, position to take would be that we want to prevent more injuries and we want to reduce the average cost per injury prevented (more accurately, the cost per dollar of injury loss prevented). In light of our analysis, how can these objectives be achieved? One way could be to focus the enforcement effort on those violations most likely to cause substantial harm. As we will see below, this focus could be captured by relying more heavily on accident investigations (AIs), which fine employers only for those types of violations that actually cause serious injuries. AIs also make it possible to penalize the large group of injury-causing violations which can't normally be detected on routine inspections. In short, this policy resembles a tax on injuries caused by violations. A second method would expand the scope of OSHA's impact to include all injuries and would leave employers freer to decide how to prevent injuries. This approach conjures up images of a tax on injuries, but it could be crudely simulated by letting employers know that the frequency of inspections would depend upon how high each establishment's injury rate was compared to the average rate in its industry. For each additional injury the costs imposed on the firm by inspections (compliance costs, fines, and lost time) would increase.

Before looking at these options in a little more detail, the reasons why an injury tax has so little political support deserve further analysis because they apply in part to all environmental and safety programs. Consider first the labor unions. Unions derive clear benefits from the enforcement of standards. Because inspections impose costs on firms, a union threat to request an inspection carries weight and gives it added bargaining power with management. On a national level, the standard-setting process provides opportunities for union leaders to intervene with the Labor Department on problems that affect their members; in addition, actual or potential victims of the hazard can furnish a human dimension. All of these features would be lost if safety standards were replaced by an injury tax. Unionists' ideological objections to an injury tax rule it out even as a supplement to standards. They object to the permissive quality of an injury tax -- that injuries are acceptable as long as preventing them is too expensive ("a license to kill") -- an acceptance of tradeoffs that clashes with the Occupational Safety and Health Act's symbolic affirmation of a right to safe and healthful working conditions.

We might expect employers to applaud the prospect that replacing standards with an injury tax would allow them to prevent injuries at lower social cost. However, once we consider that even a tax that averaged $2000 per disabling injury (although a tax should be set as a percentage surcharge on costs, not as a flat amount per injury) would probably induce the prevention of less than 10% of the 2 million disabling injuries that occur each year, we find that employers would be paying at least $3.6 ($2000 × 1.8 million) billion in tax payments in addition to the money they actually spent to prevent injuries. From a social perspective, the switch to a tax would be efficient because injuries would be prevented at a lower cost, while the tax payments are simply transfer payments. For the firms which pay the tax, however, the standards approach could actually be much cheaper (because firms almost certainly pay much less than $2 billion a year complying with OSHA's safety standards), except in the unlikely event that the taxes were rebated. A tax as a supplement to standards would present the worst of both worlds for employers.

Finally, to explain politicians' attitudes toward an injury tax we probably don't have to look much farther than the opposition of both employer and labor groups. Espousal of an injury tax won't garner credit from anyone. Also, the legislators most deeply involved in OSHA affairs derive influence from the opportunities for intervention that a standards enforcement system provides as disgruntled employers and unions seek their help. Under a more automatic tax process, these opportunities would be fewer.

Task Force Proposals

Given all of these political obstacles (not to mention several administrative problems) to an injury tax, it makes sense to look at the types of enforcement strategies outlined above. Deploying these strategies requires altering the current inspection program, whose bulwark has been "general schedule" inspections concetrated in industries with high injury rates. Accident investigations have been conducted only following fatalities or catastrophies and thus have comprised only 1% or 2% of all inspections. The last inspection type (aside from re-inspections) responds to complaints from workers. Ever since OSHA got a black eye for failing to respond to an informal complaint at the notorious Hopewell, Va. kepone plant in

1975, OSHA has loosened its criteria for responding to complaints and the number of complaint inspections now rivals the general schedule category. In heavily industrialized areas, 80% to 90% of all inspections are in response to complaints. After describing the accident investigation (AI) and establishment targeting programs, we will return to this issue of complaint inspections.

If accident investigations are limited to searching for violations that may have contributed to the accident -- rather than including "wall-to-wall" inspections of a workplace -- the inspection program turns into a tax on violations that cause injuries.[5] AIs are usually triggered by employers' telephoned reports and an expanded program entails an expanded reporting requirement, perhaps like the one in California which includes reports of all hospitalizations and amputations (about 6% of all disabling injuries) and fines employers $500 to $1000 when serious violations are found (as they have been in about 20% of all investigations). A review of the California experience reveals how an AI program might also make OSHA more effective. The violations cited most frequently as contributing to accidents were rarely ones which inspectors could readily detect; instead, they included such practices as conducting maintenance or repair work on machinery without first locking out the power source and working too close to overhead power lines. AIs provide a method for addressing those hard to detect hazards.

Probably even more important, an AI program can significantly improve OSHA's organizational intelligence. AIs supply the only information regarding the crucial relation between injuries and standards. More AIs would enable OSHA to make much more confident judgments about which standards really mattered and which were largely irrelevant. OSHA could supply employers with information about which violations had caused injuries in their industries. With such information, an emphasis on AIs makes even more sense. Employers will have a better sense of which standards are most important and the high probability of an investigation and a fine when these violations do cause injuries gives them an incentive to use the information.

While recognizing the merits of this strategy, the Task Force also acknowledged that organized labor might view it as too much like a tax; by fining employers after injuries had occurred, it closed the barn door after the cows had gone. The question then became how to tailor the AI program on a smaller scale and to give it a role where it would be especially effective. The answer that emerged was to focus it on accidents at small workplaces, substituting AIs for most of the general schedule inspections that occur there. The rationale was that even though a substantial minority of OSHA's inspections were at small plants, there are so many small plants that the probability that any one will be inspected is very small, varying around one in a hundred depending on the industry. Might not more accident prevention activity be spurred by a combination of information and the threat of AIs if a serious accident occurred than by a one in a hundred chance of a general schedule inspection? The provision of simple, clear information about the relevance of standards seems particularly important for small plants with their limited resources to devote to processing information. OSHA is currently exploring this and other AI proposals. For OSHA, they have the political advantage that small plants that are inspected can't claim that they are randomly chosen victims of a regulatory leviathan.

Although this program for small workplaces may be very efficient, it still has the drawback that its scope is limited to injuries caused by violations. This limitation can be overcome for larger workplaces by making the frequency of inspections depend upon each plant's overall injury rate compared to its industry average. For example, the frequency could go up by a certain amount for each injury above the number the plant would have experienced if its rate had been equal to the industry average. The prevention of injuries unrelated to current standards -- like back injuries -- would now be more attractive because it would reduce the expected costs ensuing from inspections, primarily the costs of compliance but also the hassle costs of outside interference. This program complements the AI proposal because it applies only to establishments large enough for injury rates to be meaningful. Because injuries are partly random events, an employer with only ten workers may not feel that his efforts will make a noticeable difference during a given year; for establishments with 50 or 100 workers or more (and these employ the bulk of workers) this problem diminishes. The major difficulty with this proposal is one that faces any attempt to impose costs for poor performance. Firms may respond either by trying to improve their performance or by trying to underreport injuries. For this reason, it is probably important to use state workers' compensation data as the basis for measuring performance. Most firms have an economic incentive to report injuries to their workers' compensation insurer, an incentive lacking in the reporting system administered by the U.S. Bureau of Labor Statistics. Use of state workers' compensation data would require state by state implementation of this policy; while administratively messy, such a procedure could facilitate evaluations of the worth of this innovation.

Nevertheless, the crudeness of this tax simulation and the administrative energies it demands might lead us to prefer other more direct incentives for larger firms. For example, the Task Force also recommended eliminating the tax deductability of that portion of workers' compensation premiums which firms with especially poor loss records have to pay. Similarly, it also suggested that good performers be able to deduct the amount of their savings. Despite their greater potential ease of implementation, these recommendations must overcome the Treasury's (not always successful) opposition to introducing new social policy wrinkles into the tax law. If these other incentives for larger firms aren't possible, then the enforcement strategy outlined here may be the best way to expand OSHA's impact. Even though the current enforcement of sometimes ineffective standards would continue under this policy, it would be used as a lever for more extensive and more efficient injury prevention among the large group of injuries beyond the reach of standards. Again, politically,OSHA can claim to be going after the bad apples.

Implementation of either the AI or the establishment targeting programs could easily run up against the resource constraints created by the recent surge in inspections devoted to responding to complaints. OSHA's concern that this phenomenon destroys its ability to deploy inspectors where they are most needed has spurred efforts to persuade Area Directors to respond by letter to complaints that seem not to be serious. However, persuasion has failed largely because of the skewed incentives: no one wants to be the official who overlooked the hazard that turns out to be truly serious, but only when workers have complained can such an oversight become known. In contrast, no one knows when responses to complaints preclude detection of more serious hazards.

The point is not that complaints should be discouraged or investigation of them curtailed. The existing evidence suggests that complaint inspections have been about as successful as current general schedule inspections in terms of violations cited per 100 inspection hours; the right to request an inspection is correctly enshrined in the statute; and none of the proposals above preclude complaint inspections. Nevertheless, it does seem practical that OSHA should take advantage of the unique feature of complaints: workers at the plant have some awareness of, and can keep tabs on a hazard. Currently, because of backlogs, OSHA often takes more than three days to investigate even serious complaints. The Task Force proposed that in all cases except imminent dangers OSHA send a certified, special delivery letter to the employer, informing him of the complaint, requiring an immediate telephoned and written response, and telling him that failure to respond would trigger an investigation, that false responses could lead to $10,000 fines, and that the complainant would be notified of the answer. In all cases where the complainant was known, OSHA would check back to see if he or she were satisfied with the answer and the employer's subsequent action. If not, and if there were reasonable grounds to suspect a problem, OSHA would inspect. While no panacea, this proposal should satisfactorily handle many safety complaints including a substantial number which are due to employer or worker ignorance or misunderstanding about what the standards require and what conditions in the plant actually are.

Although the Task Force's Report ranged much more widely, the proposals described here are especially interesting. Building upon the well understood idea that, under certain designs, standards and taxes can be equivalent, the Task Force has taken the idea on step further, and shown how some features of a tax may be captured to create more effective, efficient, and politically feasible enforcement strategies.

Evidence that this approach really can be fruitful emerged in December when Senator Richard Schweiker introduced a bill in the Human Resources Committee which incorporates -- although in a less sophisticated fashion -- many of the recommendations of the Carter Task Force. What was remarkable was the co-sponsorship of Senators Harrison Williams (Chairman of the Committee), Alan Cranston and Gaylord Nelson -- all of whom had in the past invariably joined unions in opposing any amendments to the OSH Act. Their willingness to buck the AFL-CIO on this amendment testifies to the value of trying to combine concerns with both effectiveness and efficiency in a politically feasible package.

Unions have mounted a powerful campaign against the Schweiker bill, implausibly claiming that it is the first step toward dismantling OSHA. (One result is that Senator Nelson has disavowed his sponsorship.) However, the Schweiker bill -- and perhaps any statutory attempt to prescribe an exact targeting formula -- has serious shortcomings. The most desirable outcome would probably be for the Committee to require that OSHA experiment with new approaches, and that it rigorously evaluate the results. Without strong pressure from the Committee, OSHA is unlikely to move in this direction.

FOOTNOTES

1. Charles L. Schultze, The Public Use of Private Interest (Washington, D.C.: The Brookings Institution, 1977), p. 87.

2. Making Prevention Pay: The Final Report of the Interagency Task Force on Workplace Safety and Health, December 14, 1978 mimeo, Rosslyn, Virginia.

3. These limitations do not apply to health as opposed to safety. The bulk of known occupational diseases probably can be prevented by compliance with existing health standards.

4. See Robert S. Smith, "The Impact of OSHA Inspection on Workplace Manufacturing Inspections," Journal of Human Resources, ~~forthcoming~~ Spring 1979, and John Mendeloff, Regulating Safety (Cambridge, Mass: The MIT Press, 1979), Chapter 6.

5. The accident investigation proposal is described in detail in "First Recommendations Two and Three" included in the August, 1978 suggestions for quick action.

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WILLIAM H. McBEATH, M.D., M.P.H., Executive Director

1980 APR 21 PM 12: 32
SENATOR WILLIAMS, N.J.

April 17, 1980

The Honorable Harrison A. Williams, Jr.
United States Senate
352 Russell Senate Office Bldg.
Washington, D. C. 20510

Dear Senator Williams:

The American Public Health Association wishes to submit the enclosed statement for the record of the public hearings held April 15-17, 1980, concerning legislative proposals to amend the Occupational Safety and Health Act.

Thank you for your attention to our comments.

Very truly yours,

William H. McBeath, MD, MPH
Executive Director

WHM:ams

Enclosure

STATEMENT
OF THE
AMERICAN PUBLIC HEALTH ASSOCIATION
ON
S. 2153
OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENT ACT OF 1980

Ten years ago Congress passed two bills designed to stop job-related death and disability. In 1969, when the historic Federal Coal Mine Health and Safety Act was enacted, the nation's 280,000 coal miners were promised they no longer had to fear occupational illness and injury as the penalty for working to earn a living. The same promise was extended to the nation's 95 million civilian workers the next year with the enactment of the Occupational Safety and Health Act.

Although there is no accurate national accounting of injuries and illnesses, it has been conservatively estimated that annually job-related diseases cause in excess of 100,000 deaths, and accidents account for more than 14,000 deaths and 4 million injuries. The loss of work days due to accidents is ten times greater than those due to strikes.

Prevention of these shocking losses of our human resource was the Congressional mandate in both statutes. Inspection of the worksite is a major method of providing surveillance and compliance with both the intent and letter of these laws. Promulgation of comprehensive health and safety standards is equally important. Consultation provided by OSHA to employers, especially small ones, is helping them to understand their obligations under OSHA. Moreover, the training and education of workers, employers, and trade union officials is essential for the implementation of preventive measures specified in OSHA.

Regrettably, the early OSHA program treated these and other measures with indifference and lack of direction. There was a lack of commitment to make the law work effectively and efficiently.

In contrast, Secretary of Labor Ray Marshall and Assistant Secretary Eula Bingham have made great strides in the last three years to implement the OSH Act in accordance with the Congressional mandate of preventing unnecessary job-related death and disability. Despite these laudable achievements, however, the constant drive to emasculate OSHA continues at an unremitting pace.

S. 2153, the Occupational Safety and Health Improvement Act of 1980, introduced in the Senate on December 19, 1979 by Senator Schweiker and co-sponsored by Senators Harrison A. Williams (D-NJ), Frank Church (D-ID), Alan Cranston (D-CA), Orrin G. Hatch (R-UT), and Gaylord Nelson (D-WI) is the latest in the ten-year-old battle to cripple and eventually repeal OSHA. Passage of this bill could presage a similar attack on the mining safety and health act, the OSHA counterpart covering the entire mining and quarrying industries.

Assistant Secretary Eula Bingham said, as quoted in the Wall Street Journal, December 20, 1979, that she was "deeply concerned that under this proposal OSHA's presence would generally be perceived only after injury or death had occurred." That, she added, "runs contrary to the concepts that have been generally accepted in preventive medicine throughout the last century."

The Schweiker bill is claimed by its sponsors to be a workers' bill that will improve health and safety conditions by focusing OSHA inspections on high hazard industries and encourage problem solving by labor-management safety committees. In reality, the bill will take away workers' rights to most OSHA safety inspections in over 90 percent of all the nation's 5 million workplaces, encourage industry fraud in reporting accidents and injuries, and bury OSHA in a sea of paper and objections from industry.

Specifically, the Schweiker-Williams bill (S. 2153) would do the following:

1. Eliminate most OSHA safety inspections in more than 90 percent of all workplaces in the country. The sponsors of the bill estimate 90-95 percent of all workplaces would be exempted by these provisions. OSHA could only inspect:

   a. when workers are killed or hospitalized,
   b. to check on abatement programs from earlier violations,
   c. in imminent danger situations, and
   d. in limited circumstances in response to worker complaints.

2. Deny workers the right to an automatic OSHA safety inspection in response to worker complaints. OSHA cannot conduct an inspection if the employer gives OSHA "satisfactory assurances that appropriate action has been taken to correct the violation." In addition, workers' complaints will be reduced by the S. 2153 provision which requires such complaints to be routed through management rather than directly from the worker to OSHA.

   This provision also violates Section 17(f) of the OSH Act which prohibits "giving advance notice of any inspection."

3. Wipe out virtually all comprehensive OSHA inspections and severely limit the scope of OSHA inspections. The bill prohibits OSHA from inspecting any problem area not included in the original complaint or inspection plan, in exempted workplaces. It is

not clear in this section or elsewhere in the bill whether OSHA could issue citations for health violations found during a safety inspection.

Senator Schweiker stated that S. 2153 "does not restrict OSHA authority to deal with occupational health hazards." However, later in his Senate statement introducing the bill, the Senator made it clear that he is "hopeful that experience developed under this legislation would provide a firm basis for expanding the utilization of the self-initiative methods established here."

4. Define "workplace" in a specious manner. Separate activities at a single location are defined as separate workplaces. Different operations like a coke oven, a blast furnace and a rolling mill in a steel mill would be different workplaces. Steelworkers in some of these jobs could be protected, others exempted, depending on the lost-time injury ration in each operation. Employers could define the workplace to exempt as many activities and workers from coverage as possible.

5. Eliminate fines for all serious and other than serious safety violations in exempted workplaces

   a. Employing ten or less workers
   b. Where an advisory labor-management safety committee and consultation program exists.

OSHA could not fine the employer for any serious violations, even those resulting in death or serious injuries occurring in the workplace.

Under the bill, safety committees are only advisory and have no enforcement rights or power. Employers are not required to follow the recommendations of the committee to correct hazards. Moreover, if the employer believes in "good faith" that a hazard pointed out by the committee is not a violation, OSHA cannot cite the employer for a willful violation of the law.

By removing the threat of large penalties and willful violations, the bill actually undermines workers and unions ability in safety committees to improve their working conditions. This threat is compounded by the fact that more than 75 percent of the nation's workforce are not members of organized labor and lack the protection afforded organized workers by a [illegible] bargained agreement.

6. Limit fines for all serious and other than serious safety violations in nonexempt workplaces, not exempted from inspections, where an advisory labor-management

safety committee and consultation program exists. The bill sets a maximum penalty of $700 for serious safety violations and $300 for other than serious safety violations for all non-exempted hazardous industries where the employer maintains a labor-management committee and consultation program.

Like committees in exempted workplaces, safety committees in hazardous workplaces are only advisory and have no enforcement rights or powers. Similarly, employers are protected from willful violations if they believe in "good faith" that a hazard is not a violation of the law.

7. Base the workplace exemption process on dubious statistical data. Employers with no injuries reported to the state worker's compensation agency during the preceding year will, according to Senator [illegible], "automatically qualify for the exemption." Those not meeting this requirement can still be exempted by the employer filing an affidavit with OSHA stating no deaths occurred and there is compliance with a low-lost-workday-injury rate.

The state compensation process is unreliable for some of the following reasons:

a. State worker's compensation agencies are reluctant to enter into agreements with OSHA even if financed by OSHA.
b. There are wide variations among state reporting requirements. In some there are numerical exemptions, lack of lost work day data or of restricted work activity.
c. Some states have only voluntary reporting, which means many employers do not report at all.

This system has two major faults; these are:

a. There is an incentive for the employer to discourage filing of worker's compensation claims.

b. There is an additional incentive for the employer to be less truthful in completion of OSHA accident reports.

Since the founding of APHA 110 years ago, prevention of disease and disability has been the major focus of the organization. With the virtual elimination of the communicable diseases, other public health matters such as [illegible], [illegible], however, the problem of prevention in [illegible] being recognized as the single most important factor in prolonging productive life and containing the rising costs of medical care.

Crucial to this concept is the reduction of the unnecessary job-related loss of life and limb occurring throughout the nation. There has been some measure of success in this endeavor since the passage of occupational safety and health legislation a decade ago.

Passage of S. 2153, however, will so attenuate OSHA that it will become a victim of attrition. The American Public Health Association strongly opposes the approach taken in S. 2153 as one which will cause the ultimate destruction of OSHA.

One of the avowed precepts of our government has always been the protection of property. In fact it has long been recognized as a right extended to all citizens. This right of the people to have their property protected was essential for protecting the home and the place of business. Of more recent date this protection as a right has been extended to include health. This was necessary because the maintenance of good health and the ability to work is the only property workers have to ensure economic sustenance. Thus, government has the responsibility to take all possible steps to protect the workers' health--this is their property. Loss of this property through illness or injury will ultimately increase government expenditures. Prudence certainly indicates that job-related illness and injury must be avoided if this obligation is to be fulfilled. Such a goal cannot be reached without a strong Federal program for occupational safety and health.

Statement of: ROBERT WITT, Legislative Aide, LIBERTY LOBBY
300 Independence Ave., S.E., Washington, D.C. 20003
202 - 546-5611

Submitted to: SENATE LABOR AND HUMAN RESOURCES COMMITTEE

On: OSHA

April 17, 1980

Mr. Chairman and Members of the Committee:

I am Robert Witt, Legislative Aide of LIBERTY LOBBY. I appreciate this opportunity to submit for the record the views of LIBERTY LOBBY's 25,000-member Board of Policy as well as the concern of approximately 300,000 readers of our weekly newspaper, The SPOTLIGHT.

One of the oldest and most enduring issues in government is the constant fight against bureaucratic growth and waste, and the abuse of power and citizens' rights. It is this overkill in size and use of authority which leaves the individual with a helpless feeling and creates the impression of government being a master over, rather than a servant of, the people.

The Occupational Safety and Health Administration (OSHA) is a prime example of these abuses and the need for regulatory reform.

Not long ago this nation celebrated its 200th anniversary of our forefathers' fight for liberty from oppression, entry without notice, fines without consultation, and many other "Tory" tactics. However, two centuries later many of the same ugly things are again happening to many small businessmen across the nation at this very moment--OSHA's practices and tactics.

OSHA at best has been a major disappointment, at worst an abysmal failure. The only good job OSHA has done in the last three years is in public relations. Government statis'ics show that since OSHA's inception in 1971, the rate and severity of serious injuries have risen sharply.

Significantly, before OSHA began, when industry handled safety on its own, serious injuries had been declining. Thus, despite compliance costs to American businessmen of more than $25 billion, plus more than $1 billion to American taxpayers, OSHA has failed to achieve a significant, positive impact on employee injury and illness rates.

After eight years of major investment in OSHA, Americans can only wonder where the return is on that investment. Has OSHA protected workers by significantly decreasing workplace deaths and injuries?

The unfortunate answer: OSHA has not been effective in protecting the American work force despite massive regulatory efforts.

(See tables, pp. 2-3)

The Cost to the Taxpayer

OSHA BUDGETS

YEAR	BUDGET	APPROVED WORKFORCE CEILING
1971[2]	$15,189,000	970
1972	35,884,000	1,696
1973	69,3[illegible]	1,699
1974	70,408,000	1,830
1975	102,006,000	2,471
1976[3]	117,181,000	2,004
1977	130,333,000	2,717
1978	139,070,000	2,817
1979	173,034,000[4]	3,006
Actual 9 - year total =	$852,678,000	
Projected 1980	$181,320,000[5]	2,944[6]
Projected 10 - year total =	$1,033,998,000	

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(2) Partial year - The Occupational Safety and Health Act of 1970 was signed into law April 28, 1971 by President Nixon.

(3) Transitional year - the workforce would be 2,494 if it reflected 310 positions transferred to "departmental management;" the budget would be $108,189,000 if it reflected the transfer to expenditures.

(4) Includes $1,843,000 in pay supplements additional to the approved 1979 budget of $171,191,000.

(5) The requested 1980 budget was $178,320,000. The House has approved an additional $3 million over the request to $181,320,000. The Senate has not yet voted on the 1980 OSHA budget, but the Senate Subcommittee on Appropriations has recommended an additional $5,700,000 be approved above the requested figure, for a total budget of $184,020,000.

(6) The requested workforce ceiling is 2,944. Although the House added no additional positions, the Senate Subcommittee on Appropriations has recommended an additional [illegible] positions be added to maintain the 3,006 figure.

The Cost to the Businessman

MCGRAW-HILL ANNUAL SURVEYS OF EMPLOYEE SAFETY AND HEALTH EXPENDITURES BY AMERICAN INDUSTRY
(Last Issued: May, 1979)

YEAR	EXPENDITURE (in Billions)
1972[1]	$2.509
1973	2.569
1974	3.076
1975	2.716
1976	2.376
1977	2.884
1978	4.283
Actual 7 year total =	$20.413 Billion
Projected 1979	4.871
Estimated 8 year total =	$25.284

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(1) OSHA's first full year of operation

The Benefit(?) to the Worker

WORKER OCCUPATIONAL INJURY AND ILLNESS INCIDENCE RATES[7]

(Number of Recordable Injuries and Illnesses per 200,000 hours of exposure[8])

Year	Total Injury & Illness Rate	Lost Workday Cases	Non-Fatal Cases w/o Lost Workdays	Lost Workday
1972	10.9	3.3	7.6	47.7
1973	11.0	3.4	7.5	53.3
1974	10.4	3.5	6.9	54.6
1975	9.1	3.3	5.8	56.1
1976	9.2	3.5	5.7	60.5
1977[9]	9.3	3.8	5.5	61.6
6-year change:	-14.7%	+15.2%	-27.6%	+29.1%

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(7) Bureau of Labor Statistics Summary, Report #561

(8) The 200,000 hours of exposure is theoretically equated to "per 100 employees." However, a more realistic approximation is "per 112 employees" since these BLS figures are based on a 2,000 manhour work year for employees (50 work weeks at 40 hours per week) and the average full time American worker only works 1,790 hours per year.

(9) Computing this for the total American workforce for 1977, the last year for which figures are available, these incidence rates translate into:
= 1977 Total injury and illness cases 5,460,300
= 1977 lost workday cases 2,203,600
= 1977 Average lost workdays per lost workday case 16

WORKPLACE FATALITIES[10]

Year	All Industries	Companies with 11 or more employees
1973[11]	5,700	5,340
1974	5,850	4,970
1975	5,160	4,570
1976	4,480	3,940
1977	5,560[12]	4,760
5-year change:	- 2.46%	-10.86%
1976-'77 change:	+24.11%	+20.81%

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(10) Worker deaths due to occupational injuries and illnesses; statistics compiled by the Office of Occupational Safety and Health Statistics of the Department of Labor.

(11) Fatality statistics were first recorded in 1973, unlike other OSHA statistics which generally go back for an additional year to 1972.

(12) Approximation supplied by Bill Meade, Division Chief of the Division of Periodic Surveys, Office of Occupational Safety and Health Statistics. Due to OMB budget cuts, surveys among companies of 10 employees or less were officially discontinued after the 1976 compilations. However, Meade based his estimate on the average fatalities among 10 or fewer employee companies in relation to all companies in prior surveys to show that small company employee fatalities would account for an additional 800 worker deaths beyond the large (11 or more employees) company figures.

Nevertheless, OSHA advocates continue to insist that the agency has had a positive impact and that without OSHA, worker injuries and fatalities would be even higher. Their argument is that what is needed is not less OSHA, but more; more inspectors, more standards, more dollars.

The Metal Trades Department of the AFL-CIO claims that 70% of this nation's workers would be deprived of the protections of the OSHA law.

> OSHA inspectors would no longer be able to make wall-to-wall inspections in response to worker complaints because the bill would prohibit inspection of problem areas lying outside those listed in the complaint. This would outlaw the present OSHA practice of inspecting an entire construction site in response to a worker complaint against an employer (AFO-CIO News, Feb. 23, 1980).

The United Auto Workers say that S. 2153 would gut the "worker law" and call on all unions to wage a "holy war" to save "their" law. UAW is even leading the fight to save the safety agency from any budget cuts, claiming that OSHA's money grants to labor unions are highly popular.

They claim S. 2153 would do these things:

> Companies with "good safety records" would be totally exempt from OSHA inspections. A "good safety record" would be based on data from state workers' compensation reports. Such reports are notoriously dishonest and can be easily fudged by the boss.
>
> Companies with fewer than 20 reported accidents per 1,000 workers and no fatalities in the last year would also not be inspected. This is the most powerful incentive ever devised for not reporting accidents, and gives employers a license to maim and kill.
>
> Fines would be reduced for companies with advisory safety committees.
>
> OSHA would still be allowed to make inspections after workers are killed or seriously injured. That's when it's too late (UAW Washington Report, Mar. 7, 1980).

The Oil, Chemical and Atomic Workers Union states that defeat of the Schweiker OSHA Improvements Act of 1980 is a No. 1 legislative priority for 1980 and ordains the battle to be a holy one. They claim that " . . . the Schweiker bill would gut OSHA and roll back the hard-won gains labor has made over the past decade in workplace, health and safety" (Oil, Chemical and Atomic Union News, April, 1980).

AFL-CIO President Lane Kirkland claims that "no new legislation is needed on the nation's basic federal job safety and health law. What needs to be done can be handled administratively" (AFL-CIO News, Apr. 5, 1980).

Even labor's chief spokesmen admits the need for OSHA reform. The only disagreement is how to accomplish it.

The "holy war" has even progressed to the stage that the National Wildlife Federation, a labor-backed organization that could not possibly have any interest in OSHA is urgently enrolling its wildlife enthusiasts to oppose S. 2153 "and any other gut-OSHA bills . . . before they kill us" (National Wildlife Federation's Conservation Report, Mar. 7, 1980).

OSHA itself is waging a continuing confrontation with American industry. These statements especially indicate the lengths that union bosses will go to in order to misrepresent the true aims of S. 2153. Labor is waging a knee-jerk emotional war rather than its acclaimed "holy war."

It is currently common practice for OSHA to seek limited warrants in employee complaint cases where the employer has demanded a warrant be obtained. This action is due to numerous court losses that OSHA has been subjected to across the nation and not the threat of the legislation we speak about today.

OSHA has taken a more adversarial posture than ever. It is increasing criminal sanctions and prosecutions, inciting worker unrest with inflammatory newsletters and conferences and expanding its powers into labor-management and equal employment areas. Escalated regulatory activities by OSHA in the area of worker health have taken on an uncompromising attitude.

OSHA's media seminar in Chicago last September epitomizes the agency's intensely anti-business posture.

Unsubstantiated and irresponsible agency claims that "at least 100,000 American lives are lost to occupational diseases each year" were also levied against the business community.

While 32 journalists were wooed by rhetoric and roast beef at a declared cost to taxpayers of almost $24,000, panelists repeated declarations that businessmen are "Neanderthals" and "industry always lies."

It seems clear that OSHA has assumed a combative posture toward American business, to the disservice of the concept of worker protection. Particularly sensitive to criticism at this time, OSHA has become an even more aggressive adversary to business. In an attempt to reassert both its clout and the legitimacy of its purpose, the agency has taken a narrow scientific approach to health issues.

During its first five or six years, OSHA was one of the most criticized of all federal agencies. It has since made some forward progress under administrator Eula Bingham, but many of its recent actions appear to be designed primarily to bolster its sagging image in the eyes of Congress, the press and most importantly the American public.

Almost three years have passed, and industry complaints are again increasing, along with the gradual recognition that OSHA hasn't really "changed its spots." Nevertheless, OSHA advocates continue to claim that under Bingham, the agency is taking great strides forward.

However, the records of industry and OSHA itself strongly refute this contention. A good barometer of industry's performance is a comparison of the worker injury/illness rates prior to OSHA's inception with those later.

Since 1971, when OSHA began, the number of serious injuries and their severity has significantly increased, with a more recent upswing in worker fatalities. Conversely, National Safety Council (NSC) statistics for the 8-year period prior to 1971, when industry was handling safety and health concerns itself, show a steady decline in these categories.

Note these figures for the eight most recent pre-OSHA years:

	1964	1971
Fatalities per 100,000 workers	21	17
Average work days lost per temporary total disability	27	23
Fatal injury rates	0.07	0.05
Permanent partial disability rates*	0.35	0.33

*Based on Z16.1 standard per million man hours of exposure

NSC statistics show a steady post-World War II 25-year decreasing injury and fatality rate trend for industry, which began increasing only in the 1970's during OSHA's years of regulation enforcement.

As the American work force has increased, injuries and fatalities have also increased, but the rate of these accidents' frequency did not increase proportionately until they came under OSHA's counterproductive regulatory system.

The disappointing performance of this regulatory nightmare doesn't warrant providing increased responsibility, but rather mandates re-evaluation and reform. OSHA's poor performance clearly demonstrates that voluntary safety and health preservation programs through employers' incentives are more certain to protect workers than costly government regulations geared to rigidity rather than results.

Without OSHA's arbitrary and bureaucratic barriers, its inflexible, nitpicking regulations, exorbitant paperwork and administrative burdens on business, industry would be able to effect even greater protection for workers through its own efforts. Government encouragement, incentive and consultation can aid industry, but the ultimate protection of worker safety and health must be through the employers themselves with good employee cooperation.

Not only has OSHA failed to produce demonstrable benefits in workers' safety, it has created extraordinary public controversy. Nine years ago the proposed act slipped through the House and passed the Senate 83-3. Soon OSHA, created to administer the law, became the most despised and ridiculed U.S. agency. In recent years, the erosion of public and political support is seen in several congressional votes in favor of blanket exemptions for broad classes of employers. In a free society, it has often been proved that no law can be effective if its administration and enforcement are widely viewed as illegitimate and nonproductive.

Nine years ago Congress cast the government in a policeman's role, establishing a system of crime and punishment for more than 4 million workplaces in the U.S. Although there may be a valid policeman's role in a limited number of apparent cases of criminal negligence, the vast majority of workplaces should not be subjected to such militant enforcement conditions because they are not hazardous, or at least not criminally so. In short, the federal government can participate more meaningfully in improving the occupational safety and health of America's workers.

The better way is for the government to redirect its policeman's role to functions where it is really needed to deter and correct grave occupational hazards, to provide useful research and information, and to stimulate employer and employee cooperation and initiatives to improve workplace safety and health.

It is increasingly apparent that drastic reform of OSHA is overdue. I seriously doubt that any members of Congress who voted for the original safety law in 1970 could claim that the Act brought about the results they hoped for then.

I remind you of the contempt in which OSHA holds Congress. The Agency is clearly unresponsive to congressional mandates, which further underscores the need for meaningful reform legislation. The original OSHA Act almost 10 years ago ordered the agency to make a written report to Congress on the status of the enactment of the law, as well as any needed amendments. This report, due more than seven years ago, has still not been made.

However, we now have a chance to curb regulatory overkill and work for real OSHA reform. S. 2153 has broad bipartisan sponsorship which truly indicates the acknowledged need for reform.

This legislation would provide performance-based exemptions to employers who achieve good safety records. "Safe" employers with responsible programs would receive an exemption from routine safety inspections and a waiver of penalties for serious and non-serious citations. OSHA's ability to maintain its punitive enforcement attitudes would be curtailed, and the agency's limited resources would be targeted to the truly hazardous industries where OSHA is most needed and can be most effective. Under a performance-based concept of control, employers would be given incentives and rewards for proved, responsible and successful safety programs.

This legislation is also in line with the recommendations made by the Senate Government Affairs Committee's [illegible] 1978 report on Government Regulation.

The federal government must get back to an "incentive" system which encourages business rather than the present "punitive" one. Stationing a federal policeman on everyone's doorstep just hasn't worked and certainly isn't the American way.

We strongly urge this committee to act expeditiously and favorably on S. 2153 and report it to the Senate for action.

Thank you again for this opportunity to submit our statement for the record.

REMARKS RE S 2153 BY HENRY C. MAYER, CHAIRPERSON, COMMITTEE ON PUBLIC ISSUES, ASSOCIATION FOR SOCIAL ECONOMICS. THE VIEWS EXPRESSED HEREIN ARE HIS OWN AND NOT AN OFFICIAL STATEMENT OF THE COMMITTEE OR ASSOCIATION.

The years of distinguished public service by this bill's primary sponsors is ample evidence of its thoughtful intent. Whether or not one agrees with the social utility of this proposal, one always listens to its sponsors with respect and attention. Their reputations make it a special privilege for me to respond to their views on this subject and share my response with members of this honored Committee.

A prominent and on the whole, admirable feature of S 2153 is its promotion of self-regulation. In a democracy, self regulation is a desirable and necessary goal. Moreover, a commitment to democracy also implies an acceptance of the primacy of the common good as opposed to the prevailing priority of any special interest. Ideally, the common good is best achieved by voluntary policing and an internalized personal discipline.

Practically speaking, however, the field of occupational safety and health is too large and complex for it to be dominated by the public or private sectors, management or labor. A successful program in this vital field of occupational safety and health demands voluntary and intelligent cooperation and foresight by public and private persons. In view of the size of government today, I find myself in sympathy with any move which would enhance self-regulation.

However, I do not find self regulation desirable at any price. In case of S2153, I have several unanswered anxieties and questions as to whether self regulation, as envisioned and advocated by this proposal, is in fact advanced by it. I would like to share these concerns with the distinguished members of this Committee and invite them to integrate their answers to my questions with their responses to this bill.

I. Is the mere presence of a year without accidents adequate proof of an improved safety/health program at a workplace? Such a requirement seems to assume a firm is reporting in good faith but how is this claim to be substantiated? Without public inspection, what responsibility is provided to report or act on near misses? What measures will the firm utilize to substitute for public inspection? How will there be assurance such measures will be carried out? What research actions will a firm have to perform in regard to its work environment and the work habits of its employees? Is there to be ample job protection for an employee who is troubled about a specific job practice or condition of a machine and reports accordingly on it?

II. In this time of double-digit inflation, firms will remain ever more budget conscious. How is this condition likely to affect a depressed firm's fiscal allocations to promote work-related safety and health? I especially refer to firms whose size has previously prevented the maintenance of a safety department or even a full time safety officer. Is it possible that this bill will do more for the firms with full time safety programs and/or personnel?

III. How would this bill propose to deal with a situation where a firm claims an accident-free year and the union alleges or offers evidence to the contrary? What if a firm has had a safe year but its industry is still among those considered "hazardous"? What weight would implementation of this bill assign to a "bad" year or years immediately preceding the year without an accident?

2)

4. What criteria, besides the lack of accidents, will qualify a firm for this temporary cessation of inspections? Should a firm not be required first to provide relevant facts to document its safety efforts?

5. Suppose a state occupational safety and health program has data about a firm's performance which conflicts with its federal profile? Does the federal dispensation automatically require state agencies to cease and desist their inspections for the same length of time. I find no provision for adjustment to this contigency in the bill.

6. The OSHA Act is designed to be equitably concernedwith promoting safety and health as well as enhancing the motivations of employers and employees to achieve and maintain a safer and healthier workplace. This is a complex and continuing task. In the first instance, how do the authors and promoters of this bill propose to ensure that there shall be an ongoing quality commitment to health and to deal with those situations in which safety and health factors intertwine? (See article by Ashford, MONTHLY LABOR REVIEW, September 1975, pp3-18). The achievemnt and maintenance of safer workplaces is a highly desirable social goal but the OSHA Act's concerns with a healthier workplace are also of comparable importance.

7. Finally, if allegedly 86% of industrial and work-related accidents can be attributed to human error, should not a firm, seeking [illegible]ual dispensation from inspections, be likewise mandated to report on its own efforts [illegible] programs to enhance safety motivation and practices by both employers and employees?

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4-10-80

IDENTITY PAPER

ASSOCIATION FOR SOCIAL ECONOMICS

The Association for Social Economics was founded in 1941 and began publishing the REVIEW OF SOCIAL ECONOMY in 1942. The Association (ASE) is a voluntary group of professional persons engaged in economics and allied fields who are concerned with questions, within the proper purview of economics, of human dignity, social responsibilities, liberty, freedom of choice, justice, order, equity, security, power and values. It, therefore, welcomes as members all persons, irrespective of political philosophy or religious persuasion, who share ASE's conviction that the insights from economics and allied sciences are intrinsically connected with the well-being of all persons and all groups in a free society. ASE's doors are equally open to all who espouse its intellectual values of honesty in research, reasonableness in discussion, and emphasis on the primacy of the human person. All members also share a common concern for the ethical and social implications of their findings and recommendations.

The Association's aims include:

1) fostering research and understanding in the area of social economy;
2) promoting the exchange of ideas and insights among its members across disciplinary lines;
3) stimulating constructive dialogue with other professional persons in academia, business, labor and government.

In pursuit of these aims, ASE espouses no ideology, takes no advocacy positions nor serves as a tool for any special interests. From its beginning, this Association has fostered analysis of current socio-economic issues in both their theoretical and practical dimensions. As an additional service, ASE is committed to assisting its members in making their professional expertise and views available in public and private forums where social priorities and public policies are discussed and evaluated.

As the latest expression of this commitment, the Association for Social Economics has established the Committee on Public Issues to aid its members in contributing their insights and expertise to the process of evaluating and formulating policy recommendations and legislative implementations of current socio-economic issues. In this role, however, the Association does not endorse the member's views or ideology. But it does assert that the member, using this Committee and thus identifying himself or herself as an ASE member, espouses the previously-cited values and concerns.

COMMITTEE ON PUBLIC ISSUES
Henry C. Mayer, Chairman
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United States Brewers Association, Inc.

1750 K Street, N.W. Washington, D.C. 20006

(202) 466-2400

HENRY B. KING
PRESIDENT

TWX 710-822-9208

May 2, 1980

The Honorable
Harrison A. Williams, Jr.
Chairman, Senate Labor and
Human Relations Committee
United States Senate
Washington, DC 20510

Dear Chairman Williams:

The United States Brewers Association, Inc., a trade association whose members produce more than 75 percent of malt beverages domestically brewed, appreciates the opportunity to present its views on the Occupational Safety and Health Improvements Act of 1980, S. 2153.

The United States Brewers Association supports the concept of S. 2153, that the Occupational Safety and Health Administration concentrate its enforcement activities on hazardous work places and that individual companies be encouraged to self-initiate programs to improve occupational safety and health. We congratulate Senator Schweiker, Chairman Williams, and the other co-sponsors of this bill for their efforts to provide some further direction to OSHA in the task of assuring every working person safe and healthful working conditions.

We agree with Senator Schweiker's statement upon introduction of the bill that there is little evidence to show that the Occupational Safety and Health Act of 1970 has had a significant, positive effect on work-place safety. Our industry data shows that the lost workday injury frequency rate per million manhours in the brewing industry has not changed significantly since 1970.

At the same time, the cost of complying with OSHA activities has become significant. One brewer member has estimated that, in 1979, 30 percent of its safety department's time was directly related to OSHA, translating into a cost of $81,500. A breakdown is as follows:

THIS PAPER IS MADE OF 100 % RECLAIMED WASTE

Percent of OSHA Related Activities	OSHA Related Activity
30 percent	Inspections, compliance with standards.
25 percent	Consultation on standards, keeping up with literature, commenting on proposed standards.
20 percent	Industrial hygiene (hearing conservation, sampling, and monitoring.
15 percent	Training (first aid, fire brigades, personal protective equipment, forklifts).
10 percent	OSHA recordkeeping

In addition, there were several other OSHA related activities where considerable time would be involved, including investigating complaints, contesting citations, appealing decisions, and complying with special recordkeeping requirements.

By exempting employers with good safety experience, some of this OSHA related time could be directed towards more effective safety management techniques.

Therefore, we support the proposed amendment to the Occupational Safety and Health Act of 1970, as contained in the present form of S. 2153, and urge the Committee to act favorably on it.

Sincerely,

Henry B. King

Henry B. King
President

HBK/bka

associated builders and contractors, inc.
SUITE 409 • 444 NORTH CAPITOL STREET N.W. • WASHINGTON, D.C. 20001 • PHONE Area Code 202-637-8800

STATEMENT OF
ASSOCIATED BUILDERS AND CONTRACTORS, INC.

FOR THE

COMMITTEE ON LABOR AND HUMAN RESOURCES

OF THE
UNITED STATES SENATE
CONCERNING

S. 2153
"OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS
ACT OF 1980"

April 25, 1980

Merit Shop Builds Best

The Associated Builders and Contractors, Inc. (ABC) is a nationwide trade association of more than 15,000 firms, with 63 local chapters throughout the United States. Its membership includes large and small general contractors, subcontractors, developers, home builders, and suppliers in nearly all the construction trades.

As we recently testified before this Committee, "ABC is committed to the ideal of maintaining the safest possible work site for the American construction worker and supports the goals and purposes of the Occupational Safety and Health Act." However, OSHA has not, in our opinion, lived up to the promises made at its enactment in 1970. Instead, it has polarized parties on safety and health issues by instituting an adversarial, and sometimes arbitrary, approach to enforcement of its rules and regulations. The result is that OSHA has become a prime target for the frustration and anger of the business community.

ABC believes that despite the rhetoric surrounding it, S. 2153, the "Occupational Safety and Health Improvements Act of 1980," is a moderate and responsible attempt to focus OSHA enforcement where it's most needed. The bill's goal, as stated by its sponsors, is also the goal of the business community and labor interests—to provide every employed American a safe work environment. ABC supports S. 2153, with certain amendments in specific areas.

THE NEED FOR REFORM

ABC believes that the basic elements of accident prevention are engineering, education and enforcement. With the advent of OSHA, it was apparent that the emphasis was to be placed on enforcement. After nine full years, OSHA, through the use of an adversarial technique, has not achieved demonstrable reductions in the incidence of injuries and illnesses in the workplace. This is particularly disappointing in view of the amount of time, energy, and money that has been devoted to this purpose by the government and the private sector.

This experience, together with the general perception that OSHA pays little attention to legitimate business concerns, has led us to the belief that it is time to reexamine the fundamental concepts which underlie the government's present approach to occupational safety and health. As noted above, ABC believes that a proper regulatory strategy would encompass three elements—engineering, education, and enforcement. None of these elements can stand alone. We view S. 2153 as a first step to restoring the balance among these three elements.

SUPPORT FOR THE CONCEPTS IN S. 2153

ABC along with others in the business community, has long advocated OSHA reform. We have never suggested that OSHA be repealed as some OSHA reform opponents have claimed. However, we have expressed the belief that there must be a better way for the Federal government to participate meaningfully in improving the occupational safety and health of America's workers. ABC believes that S. 2153, which represents a fundamental shift in the legal framework of the OSHA program, could lay the foundation for that "better way."

S. 2153 redirects OSHA's role of policeman to situations where it is really needed and adopts a new posture of stimulating self-initiative activities in the workplace to improve safety and health. The bill would make OSHA's direct regulation more cost-effective by prioritizing inspections of high injury rate firms. It focuses on results rather than enforcement by providing an exemption from routine inspections for low injury rate employers. The measure would direct OSHA to try to resolve employee complaints informally without the need for inspection. Finally, it sets up incentives, through the penalty structure in the law, for employers to have their own safety programs. In sum, S. 2153 adopts the proposition that employer and worker commitment to improving workplace safety will do a lot more good than occasional visits and penalties from government bureaucrats.

ABC recognizes that S. 2153 does not solve all the problems our members have with OSHA. However, we believe that the adoption of the concepts embodied in the bill can help improve occupational safety and health.

SUGGESTIONS FOR IMPROVEMENTS IN S. 2153

—A. Definition of "Good Safety Record"

Section 4A (c)(1) of S. 2153 provides a performance standard for employers which, if met, would result in relief from routine safety inspections. While we do not believe that such an exemption should be easily obtainable, we are concerned that the method of qualification operate in an equitable manner. In our view, it is unfair to compare the safety records of employers in the construction industry with, for example, employers in the retail trades. Therefore, we recommend that Section 4A (c)(1) be amended to include a mechanism that would key on the performance of an employer relative to his peers in a particular industry sector. The Standard Industrial Classification (SIC) codes could help distinguish safe workplaces in a more efficient and equitable manner. ABC believes that such a mechanism could provide an incentive for all employers to improve their safety programs by establishing a level of performance that with continuing diligence on the part of the employer can realistically be attained.

—B. Use Of State Workers' Compensation Data

Section 4A (b) of the bill uses existing state workers' compensation data to identify workplaces with good safety records. ABC questions the feasibility of using such data given the "no fault" nature of the workers' compensation system. In addition, workers' compensation data are not comparable from state to state nor automatically accessible to OSHA. Again, SIC codes could be used to distinguish safe workplaces in an efficient and equitable manner.

There is still another problem with using state workers' compensation data. Many members of the business community perceive the use of such data as the first step towards federalization of the state workers' compensation program. There is some validity to this perception since Section 3(i) of S. 2153 authorizes the Secretary of Labor to make grants to assist the states in improving the administration of the program. If the use of state workers' compensation data is retained as the means for determining an exemption, we urge that this language be changed to assure that grants to state workers' compensation agencies be made solely to assist them in providing the information necessary to administer the exemption and not for any other purposes.

—C. Definition of the "Workplace"

Section 4A (a)(4) of S. 2153 defines "workplace." ABC does not believe that a new definition of "workplace" is either desirable or necessary. Many ABC members are concerned that any new definition of workplace will complicate or change the existing understanding of "establishment" in OSHA regulations (See 29 CFR 1904.12(g)). These regulations define "establishment" as "a single physical location where business is conducted or where services or industrial operations are performed." However, where distinctly separate activities are performed at a single location, such as construction activities operated from the same physical location as a lumber yard, each activity is treated as a separate "establishment". In addition, for firms engaged in activities which may be physically dispersed, such as construction, "establishment" is the place to which employees report each day. Finally, for employees who do not primarily report or work at a single location, "establishment" is the location from which they are paid or the base from which personnel carry out their activities. ABC requests that consideration be given to using the existing definition of "establishment" as set forth in the OSHA regulations in place of the proposed, more complicated definition of "workplace."

D. Advisory Committees And Consultation Programs

ABC members have expressed reservations about the concurrent requirements for advisory committees and consultation services in Section 4A (d) of bill. The formation and meeting of employee advisory committees in the construction industry can be difficult and costly for an employer because of the dispersed nature of the workforce. In addition, some employers who already have operating advisory committees fear the intrusion of this provision on their existing programs. While we note the use of these committees is voluntary, we fear they could be used to harass a single employer.

In sum, while we believe it is the obligation of the employer to provide a safe and healthy workplace for this employees, we also believe it is the prerogative of the employer to choose the means by which that safe workplace is achieved. Therefore, we recommend that an employer be able to use *either* a safety advisory committee *or* a consultation program to qualify for the penalty exemption or limitation provided in Section 4A (d) of S. 2153.

CONCLUSION

ABC reaffirms its support for the objectives of the Occupational Safety and Health Act. However, we do not believe those goals are being met. ABC believes that S. 2153 represents the first step toward finding a "better way" for the federal government to meet these goals by working in cooperation with employers to achieve the safest possible workplace. With the amendments recommended in this statement, ABC supports S. 2153

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Statement of

The Associated General Contractors of America

on S. 2153

Submitted to the

Senate Labor and Human
Resources Committee

April 28, 1980

AGC is:

- **More than 30,000 firms including 8,000 of America's leading general contracting firms responsible for the employment of 3,500,000-plus employees;**
- **133 chapters nationwide;**
- **More than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utility facilities.**

The intent of S. 2153 appears on the surface to offer our members some relief from the frustrations of dealing with regulations both ill conceived and poorly administered, which grew out of the Occupational Safety and Health Act, a law which this association has found to be poorly administered since its passage.

In the body of S. 2153 we see an attempt at improving the OSH Act; however, some modifications are needed to make the proposal for amendment acceptable to the employers destined to live with the changes in the construction industry. Additional modifications suggested would be:

1. Apply the whole of S. 2153 to PL 91-54, the Construction Safety Act of 1969, which remains in effect and has never been repealed despite the existing OSH Act (PL-596).

2. Multi-employer work sites would be plagued with the problems of OSHA's inspections and determination of who does or who does not get inspected on each job site. One way of solving this is to key the exemption to the "Prime Contractor", who in a single contract system could control the situation. Multiple contracts and the manifold problems associated with them and the general confusion under OSHA have been the source of never ending litigation.

3. Some means of identifying "exempt from OSHA inspection" contractors would be a burden only OSHA could shoulder. The cost of such, because exemption would not be static for all, if any, construction employers, would be astronomical. Where is the saving to be realized if government certifies the exemption of each employer? Who else can do so under the terms of S. 2153?

4. The existing Workers Compensation Laws would not provide the information concerning reports of "2-or-more lost days" referred to in the latter portion of 4A(b) of S. 2153.
   Only Hawaii among the 50 states is so geared to function. Waiting periods of either 3 or 7 days are encountered in the other 49 states. Thus the records required by S. 2153 do not exist.

5. Refusal by employees to serve on the advisory safety committee, (provided by section 4A(2)(E), gives the employee the right to disqualify any job site from the penalty limitations of subsection(d) of S. 2153. The potential for abuse in times of labor-management disputes is obvious.

6. Establishment of competency requirements for safety professionals under section 4A(g)(1)(D) of S. 2153, by the Secretary fo Labor is a problem. How can he do

this when his own house is in such disarray?

7. Disqualification of an establishment having had an occupational fatality under section 4A(c)(2) does not take into consideration the fact that state records for Workers Compensation cover, unlike OSHA violations, and so would generate penalties in death situations totally unrelated to occupational safety.

Examples could involve:

1. **An uncontrolled fire truck striking and killing a job site laborer being transported to another part of the job in the superintendent's pickup truck.**
2. **One craftsman being attacked and fatally injured as a result of a jurisdictional dispute.**
3. **Death by natural forces such as flash foood, tornado or lightning.**

On balance, AGC is unable to support S. 2153 as drafted although we recognize the helpful intent of the proposal.

KANAWHA
VALLEY
COALITION ON
OCCUPATIONAL
SAFETY AND
HEALTH

Honorable members of this Senate committee, we feel that the so-called aim to direct OSHA's efforts to areas where it can do the most good is a misdirected and vain effort if S-2153 is considered to achieve that goal.

This committee adopted and passed an ideal in the OSHA ACT of 1970 Which says the following:

The purpose of the ACT is "...to ensure so far as possible every working man and woman in the Nation safe and heathful working conditions and to preserve our Human Resources..."

"Exemptions" is the key note in S-2153. The majority of Americans across this Nation would be deprived of the provisions this committee approved just 10 years ago.

Qualifications for exemptions are made so easy that practically any business can pass the test by making promises, concealing evidence, refusing to pay Workmans' Compensation, falsifying records, and be sworn affidavits.

Poor attitudes toward safe conditions would follow and a syndrome of "increased accidents and injuries" would develope.

This bill is greatly underestimating the great many businessmen, supervisors and other company personell with authority over working men and women and their unrelentless drive to get ahead at all costs, cutting conors, jury rigging and improving with unsafe equipment and methods. These things get the money man ahead but the costs are too great to the working people.

The road is made clear for these atrocities because OSHA won't be around, thands to S-2153

One member of our organization is an employee of Appalachain Power Co. (John E. Amos Plant). He is the chairman of the safety committee for their local union, 8621 USWA AFL-CIO-CLC. In his testimony of OSHA's effects he states the following:

"Since our first contract was ratified in May 1978 and the safety committee was established, we have called upon the local OSHA agency three times. The last OSHA visit was in August, 1978. Since this time, there has been a remarkable turn-around of co-operation from the plant management on matters of safety and health.

"We have quarterly meetings with the company for discussion of Company Policy on safety and health and for suggestions and comments. These meetings were established by contract. Between meetings we use a system of "UNSAFE CONDITION REPORTS," a for designed by the company (NOT CONTRACTUAL). Any unsafe condition observed by an employee can be reported by this system or directly to his immediate supervisor.

"Before our first complaint was files with OSHA this system of "UNSAFE CONDITION REPORTS" appeared to have no priority. The reports piled up in the supervisor's desks.

"Once we filed the three valid complaints with OSHA and established the fact we were not afraid to request OSHA's presence to enforce our rights to a safe and healthful workplace the "UNSAFE CONDITION REPORTS" took a place on the priority list. I am getting same results by personally contacting the safety coordinator.

"I have no doubt that the priorities on safety will drop significantly should S-2153 be passed by the Congress."

We have in our organization non-union members as well as union members. We have asked our non-union members what they thought about OSHA and its effects on safety and health on the job.

COMMENT: Nobody is brave enough to call OSHA

COMMENT: I've never seen OSHA at my plant.

COMMENT: People get hurt every day. I've seen guys get an eye put out, fingers chopped off, bones crushed, but I personally haven't seen OSHA.

COMMENT: I had an accident--I've had surgery twice on my right leg to remove the cartilages, broke my jaw and had same cuts. The company claimed I was hurt at home playing ball. They fought me in court for two years to deny me compensation benefits but I won the case. Then they fired me last March--said I missed too much work. I did miss alot of work but always excusable by me doctors and mostly because of my bad leg and a back injury. I never had a safety meeting or safety training. I wish I would have called OSHA.

COMMENT: Workers at non-union plants have no job-protection and are subject to losing their jobs without notice or mercy. If OSHA was called in they would find out who did it.

COMMENT: If OSHA is called in on a specific complaint then heads are going to roll even though the names of the complainants are held confidential.

These comments from non-union workers were not quoted to this Senate Committee to infer that the OSHA administration is derelict in its responsibilities or that it might be ineffective.

On the c ontrary, OSHA, with its limited resources responds to "IMMINENT DANGER SITUATIONS", "CATASTROPHES AND ACCIDENTS", "VALID EMPLOYEE COMPLAINTS" then "PARTICULAR DANGERS IN LOCAL INDUSTRIES" and "RANDOM INSPECTIONS" follow on the list of priorities.

Generally speaking, if there are no complaints from the non-union workplaces then violations are discovered by random inspections and if these violations are serious enough the workplace may be added to a higher priority list for inspections thus adding to the work load for OSHA. It is possible that many non-union workplaces may not be visited by OSHA for randon inspections due to workload, priorities, and limited resources.

KVCOSH has come in contact with numerous examples of the problems of occupational safety and health in relationship to non-union workers. The following is another example of a non-union worker and the problems he encountered.

On day a non-union Carbide worker came to our office. He was 35 years old although he looked at least 60. He was married and had 4 children. His occupation was construction and he worked on the side in addition to his regular work at Carbide.

In 1975 he had an exposure to TDI. Nothing was done about this exposure. Little, if anything is known about its occurrance. In fact, this worker continued to be punched in daily and received a pay check even though he was off sick. He had a problem breathing for a while but he went back to work.

In 1976 he fell from a red-tagged scaffold. It is unclear whether or not the scaffold was labeled unsafe by OSHA or by the company. However, it was known to be unsafe since 1975. He fell through a rotten board and landed on solid concrete 18 feet below. On his accident form it stated that he was testing the scaffold even though everyone knew he was tearing it down. OSHA was never informed about the fall.

Again he was clocked in and out daily even though he was off work. This happened until he had to have his first surgury in 1977. The company filled out his workman's compensation forms for him.

In 1978 he again went in for surgury. This time they found blood clots on his lungs. (A possible problem with TDI exposure)

When KVCOSH saw him in 1979 he had extreeme difficulty breathing. He coughed numerous times. When he tried to drink coffee to help calm the coughs he had to have help getting the cup to his mouth. His nerves had deteriorated so much that he could not control his movements. This too, is a possible side-effect of TDI exposure.

This man had no union so no one called in OSHA when these incidents occurred. This man had no protection so no one called OSHA or any agency to insure that proper safety and health conditions exist in the workplace. These accidents did not have to happen.

These workers are also a part of our human resources and deserve a fair bread by the powers of OSHA to enforce their rights.

If the honorable Richard S. Schweider and his colleagues are genuinely interested in improvements, perhaps a good starting point would be appropriations for increased staffing within the OSHA administration.

Everyone profits in the long run from OSHA's efforts; Business men and workers alike.

Business profits by less man hours lost, higher production, a showing of care for the employees safety and health generates better attitudes, work quality and greater sense of responsibility to his job. Insurance reates are kept to a minimun and Workman's Compensation dollars are saved. Workers profit by sharing a long and healthful life with their family and friends. Tax dollars serve all of the people.

In our efforts to analyse the impact and effects of S-2153 on our Nations workers, one particular segment of the bill is observed as seemingly unimportant at first glance.

Taking a second look at this segment, which would eliminate fines for serious and non-serious safety violations for companies with ten or fewer employees in the last year, anyone with some good ol American horse sense would begin wondering about the fairness of such a proposal.

The qualifications for this exemption is based on number of employees. This must surely be unconstitutional.

If civil penalties are imposed on an employer with eleven or more employees for violation of the same, or similar, safety regulations as the employer with ten or less employees, then this proposal may indeed suggest a new concept of justice: Dividing unequally--We will ssign rights to certain individuals--other will receive no rights.

Small businesses are nemerous across this nation and they use basically the same tools, equipment, chemicals and machinery and other materials as the larger businesses and in many cases materials and equipment not normally found in the larger businesses is used. Automated plants not requiring a large work force but having the same potential as competitors with larger work forces amplify the point.

Civil penalties are a necessity in a democratic society as a tool to promote compliance with the law.

One exemption leads to another, one weakness breeds another.

Mr. Schweiker should propose in his next bill that criminals could be exempt from fines and punishment if a certain number of people are in that criminals family. Wonder what this would do to the crime rate?

Conscientious employers with good safety programs, good records comply with safety regulations and are not bothered by OSHA.

OSHA can be a friend if its services are fully used for the advantage of Training and Consultation.

OSHA is not without compassion or mercy when an oversight is made providing in good faith some violations are not intended or are simply misunderstood.

The sum of the total exemptions provided in S-2153 lead to the following conclusions:

The bill makes inspections so easy to avoid and penalties so inconsequential that it gives no incentive to employers to improve conditions.

S-2153 has the appearance of a two page modification to be inserted in the present book of rules. However its contents are compacted and destructive.

Those of us who are working in safety and health groups want to improve working conditions. Sometime the only way that improvements will happen are if the employer is fined. As we have shown in our oversight hearings, repeats in the State of West Virginia for serious and willful repeated violations. The cost of life is too great in these circumstances.

By the time the full impact would be realized, should the bill run its course in the Congress, businesses effecting people in many places across the United States will have reverted to the "rocks and shoals" of yesterday.

This committee may find itself considering, someday, these revelations made today and the same ideals it considered in 1970.

STATEMENT

OF

THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

ON

S. 2153

THE OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980

May, 1980

I.

INTRODUCTION

SPI is a Corporation organized under the Not-for-Profit Corporation Law of the State of New York. Its 1500 member companies and individuals and 67 operating units include those who supply raw materials; process or manufacture plastics or plastics products; engineer or construct molds or similar accessory equipment for the plastics industry; and engage in the manufacture of machinery used to make plastics products or materials of all types. SPI is the major national trade association of the plastics industry. The majority of its members are the processors and converters of the plastic resins into end products which represent 75% of the dollar volume of sales of plastics in this country; SPI's membership also represents 95% of all plastics materials and machinery manufactured in the U.S.A. Thus, The Society's concern with plastics begins with the manufacture of raw materials, carries forward through their polymerization into plastics resins, continues with the various processes which convert the resins into their multitude of end uses, and includes, ultimately, the recycling or disposal of plastics products.

A primary goal of The Society of the Plastics Industry, Inc. (SPI) is employee safety and health. The SPI Committee on Safety and Health's official policy on safety and health in the workplace stresses the constant need to implement workplace practices designed to facilitate the safe manufacture of plastics and their constituents, and the safe manufacture and use of plastic products, machinery and equipment in the daily work environment. A key part of that policy endorses full compliance with both the letter and intent of the Occupational Safety and Health Act. It also advises maintaining records not only for compliance purposes but also for the identification of hazard areas, collection of industrial accident and safety data, research and implementation of safety programs and employee safety training. It further encourages active participation in the development of consensus standards.

In this vein SPI has made and will continue to make available to its membership data and information on the best means to achieve safety goals. Additionally, SPI has instituted a program of safety awards as an incentive for safety monitoring and achievement. The Society has also been working on the development of a comprehensive Plastics Industry Safety Manual and the collection and transmission of member safety and health data.

II.
THE SPI POSITION IN GENERAL

The Society of the Plastics Industry is encouraged by the introduction and consideration of S. 2153, the Occupational Safety and Health Improvements Act of 1980. After nearly ten years, the time is overdue for Congress to deliberate needed changes in OSHA. We agree with several concepts embodied in the legislation: 1) emphasis upon greater cost-effectiveness of all OSHA procedures, particularly inspections; 2) focusing on the results, the safe workplace, rather than means to achieve safety, that is to say, the specific way or ways in which that goal is to be achieved; and 3) the heightened encouragement of even greater private sector participation in the whole business of maintaining, inspecting and controlling safety.

Specifically, SPI endorses the following features of S. 2153:

1) the idea that nonpunitive incentives be mandated for those businesses with good safety records;
2) the plan to exempt certain firms with excellent safety records from continual or routine inspection;
3) attention to results rather than specific com-

pliance methodology; and

4) the overall reduction of merely routine inspections.

All of these features have the advantage of focusing a significant amount of the responsibility where it should be -- with the individual employer and its employees.

We are somewhat less comfortable, however, with certain other aspects of the bill. For example, while the idea of safety committees has our support, it seems arbitrary to deny exemptions totally to employers whose employees demonstrate no interest in safety and choose not to participate in a safety advisory committee. This provision is echoed in the general tenor of the bill which allocates no responsibility to the employee for the protection and safeguarding of his own safety. The bill as a whole fails to acknowledge any role for the employee to play, making all the "voluntary self-initiatives" a burden of the employer only.

The OSHA Act made provision only for an employee to represent employees during inspection and included some highly general language about employee responsibility to comply with OSHA standards and regulations. S. 2153 does not significantly alter this approach.

Further, although we do not find their use objectionable, it is not clear that the intent of Congress would be legally fulfilled by the establishment of in-plant safety committees and/or the employment of outside consulting firms.

Certainly, nothing in the original Act or in the Reports accompanying it reflects consideration of this kind of structure for enforcement of health and safety standards and the achievement of compliance.

OSHA has thus far aimed the bulk of its compliance efforts at employers only; it has apparently used hit-or-miss sampling to determine who and what to inspect and then has used a target method to select the industries upon which it will focus. The testimony of OSHA's Basil Whiting on this very issue is instructive. It explains the OSHA philosophy as a whole and, perhaps, why OSHA enforcement policies have led to dissatisfaction with present procedures and policies:

> The Agency has a procedure whereby an area office will go to a small number of firms in each of the high hazard industries, and then go back and do additional inspections in all these industries as resources permit. The idea is to penetrate each of the high hazard industries so that the Agency establishes a "presence." We believe this creates a ripple effect. In other words, by going to a few firms in an industry, the word will spread to other firms....

From this it is clear that OSHA's top administrators prefer to control through fear and intimidation rather than to provide for safety through cooperation.

III.
THE SOCIETY's SUGGESTIONS

We suggest that OSHA abandon this unproductive approach and allot to both employer and employees a much larger role in the safety-achieving process than they are presently playing. SPI has welcomed and continues to welcome the opportunity to participate at every level of OSHA activity which is results-oriented and based on cooperative efforts.

If we think of OSHA's activities and responsibilities in terms of four areas — regulation, inspection, compliance and litigation — it is clear that inspection, though apparently mundane, is at the core of the entire process. Since any rule affects the employer primarily at this stage, this is the point at which the employer has what may be his only contact with the OSHA bureacracy, and this is where the system is at its weakest. A number of our proposals, therefore, focus upon changes that might be profitably made in this area.

First, inspectors need to be trained and prepared adequately so that they fully understand the nature of the industry, its product and the processes that are the subject of the inspection. Very often in the past inspectors have displayed an appalling ignorance of the technical necessities of industry. As a result they have been unable to make informed evaluations of procedures, operations and

/

the feasibility of the corrective actions they have proposed.

As to our industry, it is essential that there be plastics specialists, as well as experts in other technical fields, not only to advise as specifications are written, but also as standards are enforced at the local level. It may very well be that it is not merely from lack of standards to apply, but also from a lack of knowledge of how to apply them, that OSHA falls back so often, and often carelessly, upon the General Duty Clause, the catch-all thats use is even now being more heavily encouraged by OSHA.

In this regard, SPI is willing to offer its technical expertise to aid in training or to consult with inspectors about all phases of our industry, its products, and processes, to ensure that inspections become much more than simple broad-brush enforcement tools.

On another aspect of inspections, if the employer has, as is his constitutional right, denied an inspector access to his plant, we strongly suggest that the employer be entitled to be present at the hearing during which the Agency requests a warrant to force an inspection. The current ex parte procedures are unnecessary and unwarranted. It would be most helpful if both sides could present their positions with regard to an inspection before the process becomes antagonistic, not only as to the issue of an inspection but as to the actual existence of the Agency.

And this brings us to our next point -- we strongly encourage a refinement relative to contesting citations. There needs to be more emphasis on and encouragement for settlement and mediation before cases go up to the Review Commission. Settlement at the local level can obviate the vast investments in time and money involved for both sides to resolve a contest. There is no reason settlements could not effect the same or better results in a much shorter time than is currently required by litigation. Additionally, settlement can allow for greater flexibility in achieving safety goals if trained and knowledgeable OSHA personnel are given the authority and strongly encouraged to shorten, simplify and make less expensive the manner in which OSHA's and industry's safety goals are met. No one wishes to remove OSHA's enforcement arm, but practical enforcement is hampered by the present system which requires litigation to resolve disagreements relative to how the same goal should be achieved.

It is evident that there are heavy costs in time, effort and money for all parties concerned if the system continues as it is. These are not merely the costs of compliance and the costs of litigation, though these sums are vast. There are human costs, also, in the time it takes to work out a safety program in an adversarial climate. SPI suggests that OSHA procedures require serious attempts at compromise and that the costs of all types be measured against all benefits which can be achieved.

The rule making procedures are as effectually ex parte as the warrant procedures if there is no real attempt to listen to and benefit from consensus views of all parties at every stage. In line with this, SPI suggests also that all costs of compliance be shared to the extent that employees be mandated to bear part of the burden of protecting themselves. For example, if a condition of safe employment is that they wear respirators to protect themselves, employees should be explicitly required to wear them. This is more sensible and more goal-oriented than mandating a low level of exposure and then putting the entire burden upon the employer.

In point of fact, OSHA is certainly not presently, putting any of the burden on the employee, as this recent directive makes amply clear:

> Guidelines for citing worker exposure to Direct Black 38, Direct Brown 95, and Direct Blue 6 benzidene-based dyes were issued to Occupational Safety and Health Administration field personnel in OSHA Instruction CPI 2-2 27.
>
> Citations for violations of Section 5(a)(1) of the Occupational Safety and Health Act should be issued if employees are exposed to one or more of the three dyes by any route, including inhalation, ingestion, and skin absorption, the directive stated. Where exposure by inhalation can occur, the inspector should issue the citation "regardless of whether respirators are used, provided it is feasible to prevent or reduce atmospheric contamination by engineering control measures or good work practices," the instruction said.

What this means, in effect, is that because the total effort goes into forcing employers only to comply with what can be impossible to achieve standards, that many firms can be severely economically affected to the point where they must lighten their own burden by reducing the workforce or even going out of business. This is not mere rhetoric: the costs of compliance, when mandated in terms of absolute standards and when unshared by employee and employer in the kind of rational manner we proposed above, are staggering. These costs do not need to be so high. The problem results many times from the rigidity with which principles of enforcement are applied across-the-board. And again what we stress is a greater flexibility of approach.

When OSHA was established in 1970 it was convenient and efficient to adopt certain already-existing consensus standards of independent standards-making organizations and so on. Since then, the relatively few standards promulgated by OSHA have reflected the approach which sets up the Procrustean bed and then forces employers large and small to sleep in it. We ask that the end be permitted equal or near-equal status with the means.

Regulations, in general, can be structured in three ways. One is a regulation that states general prevention objectives while utilizing stringent enforcement. This type of regulation requires complex enforcement procedures to compensate for the great flexibility allowed by the general objectives. The second and most expensive type of regulation, detailed technical design and specification standards, can control a hazard if the regulator has a complete knowledge of the industry being regulated, but can also set up a situation where industry innovation and incentive can be stifled. The third, and SPI's preferred alternative, performance standards, provides the best balance between the need for flexibility and protection. Performance standards provide maximum protection from the hazard because they allow industry to make full use of its resources and technology to achieve the specific objective of the regulation. Additionally, enforcement needs, interpretational difficulties, compliance efforts and the need for litigation to enforce such a regulation are minimized.

Also, less technical effort is required to prepare a performance-type regulation. To write a comprehensive and fair specification regulation, regulators must become thoroughly familiar with all facets of the industry to be regulated. To secure this depth of knowledge requires many man-years of study. In actual practice, the regulation writer visits several specimen plants and writes the rule based on the knowledge gained in the process. (Is it any wonder why some companies are so anxious to have government regulators visit their plants prior to the proposal of a standard?)

A performance regulation does not become obsolete as technology changes.

Compliance with a performance standard will also be expedited because the objective is seldom controversial. Disagreements generally rise over how to comply with the specification standard. When the means to achieve the objective are not a part of the regulation, then there are no law suits, contradictory interpretations and overlapping regulations. Thus, all a company's resources can be marshalled to comply quickly with the regulation and to assure the real objective, protection of employees.

Performance standards maximize cost effectiveness. The consumer ultimately pays for these costs of compliance through higher prices or loss of products and services through government mandated inefficiencies. More important to industry, though, is that specification requirements often give one company a cost advantage over another. Thus, the whole competitive price structure is upset by monopolistic tendencies stemming from a specification-oriented rule.

In summary, performance-based regulations derived from the needed objectives expedite regulation, are easily understood and enforced, do not become obsolete, provide a higher level of protection, are easier to comply with, and reduce costs for everyone. For the regulated industry, performance regulations provide an additional advantage because they are a challenge to improve technology and the management of scarce vital resources.

Performance standards seem to us to provide the necessary flexibility for the employer, particularly the small employer, to comply with the ends without becoming impaled on the means.

IV.

SUMMARY OF SPI's POSITION

In sum, costs and benefits analyses in connection with standards-setting, rule making and inspection/enforcement will work for OSHA in that it will become a more efficient and more effective agency, insofar as it husbands its resources to allocate them wisely.

To reiterate, S. 2153, a bill "to concentrate enforcement activities on hazardous work places and encourage self-initiatives," embodies a philosophy we can approve; it would provide for employer-controlled safety factors and reduction of routine inspections. We feel, however, that these plans do not go far enough in encouraging employee participation in safety. Should the employees, for example, prove to be uninterested in participating in a safety committee, there would be no exemption. We are also somewhat doubtful as to the legality of implementing the proposed committee structure. There is also no attempt in the bill to revise the review procedures, improve the quality and efficiency of the inspection procedures, or deal with performance standards.

A number of industry concerns, therefore, remain to be addressed by this and subsequent bills. We can, therefore, offer only qualified approval for this attempt to make OSHA more flexible and more responsible. We like what we see but additional efforts are needed. We believe that our suggestions for 1) improved inspection procedures; 2) improved settlement procedures; 3) improved costs allocation; and 4) greater cooperation between agency and industry in all those procedures would accomplish what both OSHA and industry want, that is, safe work places for all workers.

NATIONAL ASSOCIATION OF FURNITURE MANUFACTURERS
8401 CONNECTICUT AVE., SUITE 911 WASHINGTON, D.C. 20015 301/657-4442

SENATOR WILLIAMS, N.J.
1980 MAY 12 PM 4 13

May 9, 1980

The Honorable Harrison A. Williams, Jr.
Chairman, Labor and Human Resources Committee
United States Senate
Dirksen Senate Office Building, Room 4232
Washington, D.C. 20510

Dear Senator Williams:

The National Association of Furniture Manufacturers wishes to express its strong support for S. 2153, the "Occupational Safety and Health Improvements Act of 1980."

NAFM is a national trade association representing manufacturers of wood, upholstery and metal furniture. Our association represents manufacturers in 43 states producing about 40% of the furniture manufactured in the U.S.

S. 2153 achieves several important objectives:

- It protects American workers from unreasonable risks in the workplace;
- it provides relief from some inspections to businesses which have a proven safety record;
- it encourages businesses to improve their own safety programs;
- it promotes efficient use of taxpayer money without sacrificing the quality of worker safety.

This important bill constitutes a positive, results-oriented approach to worker safety. We believe that business and government can, and should work together to make the workplace safe as well as productive.

NAFM, for example, has formed its own Occupational Safety and Health Committee to promote worker safety in furniture manufacturing facilities. We have been in the forefront of voluntary industry efforts to promote the safety of upholstered furniture.

In brief, it is our considered opinion that S. 2153 is in the public interest and will contribute substantially to achieving voluntary compliance with the Occupational Safety and Health Act you authored in 1970.

We respectfully request that this letter containing the views of furniture manufacturers be included in the hearing record on S. 2153.

Sincerely,

Frederick L. Williford
Executive Vice President

FLW/bj

TESTIMONY OF MICHAEL B. RUSSELL
ASSOCIATE DIRECTOR
SOUTHERNERS FOR ECONOMIC JUSTICE

Southerners for Economic Justice was founded four years ago by a group of prominent southern civil rights leaders who had come to the common realization that peoples' civil rights could only be partially and incompletely enjoyed when those rights were not protected in the workplace.

While our work has focused on these workplace rights, we have at the same time maintained a deep and abiding interest in workplace safety and health since disability and death infringe dramatically upon peoples' ability to enjoy the fruits of their labor.

Southerners for Economic Justice (SEJ) opposes the reporting out from this committee of any bill which would tamper with the Occupational Safety and Health Act of 1970. We specifically oppose S2153, the so called "OSHA Improvements Act of 1980" which we believe would more accurately be named the OSHA Travesty Act of 1980 since the actual repercussions of the passage of this bill will be increased numbers of work related injuries and deaths and decreased employer accountability, compliance, and co-operation.

It is a sad comment on our times that this committee can even consider turning its back on the vast majority of its constituents -- working people -- to assuage the business community's fanatic hatred of OSHA, prompted by their desire to extract more profits from their workers' health. We find it tragic that in inflationary times this bill could even be considered since its passage would inflame inflation, not stifle it. (See Appendix 1) SEJ considers it shameful that the safety and health of American workers could even for a moment be used as a bargaining chip in the move to balance the budget and reduce inflation.

SHIFTING, NOT REDUCING REGULATORY BURDEN

Furthermore the bill won't accomplish what it claims it will, the reduction of unnecessary regulation. S 2153 proposes to exempt 80-90% of all workplaces from routine inspections and most worker instigated inspections because, it argues; 1) OSHA cannot effectively inspect all the workplaces; 2) Most of the workplaces are safe; and 3) OSHA should focus on those places with a proven hazard record.

But it is the standard to be used in making the exemption that demonstrates the flaw in this logic -- while "focusing" OSHA's inspections and enforcement responsibilities S 2153 intolerably broadens OSHA's regulatory responsibility by requiring that they now police and verify states' workers compensation statistics reporting processes.

Under 2153 OSHA becomes responsible for policing an unfamiliar and unrelated statutory entity which is absurd given business' complaint that OSHA regulates too much already. What S 2153 will accomplish in this respect is to delay safety and health enforcement by adding another layer of public resistance -- that of state governments -- to the present list of safety and health enemies.

In addition to health inspections and some safety inspections OSHA will be required under 2153 to maintain vigilant policing of compensation systems. Even if we presume that it is in the interest of the business community to see that their states comply, states are going to resist OSHA regulatory incursion into this new arena. The immediate effect of 2153 will be confusion. In the long run it won't work.

But the basic question remains -- why police a new system when an immense job remains to be done making workplaces safe and healthy?

EFFECT ON COMPENSATION SYSTEMS

S 2153 has its destructive aspects as well. It is our opinion that its enactment will set the workers compensation system back 100 years.

At the point where an OSHA exemption is tied to workers compensation statistics companies are provided with an incentive to falsify or dispute workers compensation claims.

If by expending a few dollars on legal expertise companies can not only save paying compensation, but can also be exempted from safety inspections, isn't it worth their wile to contest all compensation claims? This has clearly been the case with the textile industry even with no exemption available. They are litigating every byssinosis case unmercifully in order to claim that byssinosis is a minor problem, not worthy of regulation. The Cotton Dust standard, before the Supreme Court at this very moment, has already been delayed eight years through the textile industry's intransigence.

What about falsification? Many companies in the South already make it a practice to bring injured workers back into the workplace rather than report a lost time accident. S 2153 will further encourage this practice. In addition to avoiding increased insurance premiums and compensation costs, companies will now be able to avoid OSHA inspections by falsifying reports.

Finally S 2153 ignores the fact that most states' compensation laws do not have prohibitions against firing an employee who files a compensation claim. Many workers are intimidated into helping the company defraud the health insurance carrier by allowing the health insurer to pay medical bills rightfully belonging to compensation. If they don't co-operate they face firing.

Again S 2153 encourages employers to use retaliatory threats against workers who want to file justifiable claims under workers compensation systems.

These deleterious effects of S 2153 are reason enough to defeat S 2153, but there's more.

OSHA AND UNORGANIZED WORKERS

78% of America's workers are unorganized. Their ability to use OSHA is dramatically limited by that fact. Why?

Because even though those workers are theoretically protected by the NLRA and 11-C, in practice unorganized workers have little chance of re-instatement after they've been fired for complaining about safety or health hazards. In South Carolina 95% of all 11-C complaints are found against the worker -- only one in twenty is re-instated.

What does this have to do with 2153? Very simply this bill attempts a sleight of hand trick called "worker advisory committee."

S 2153 sponsors hope to make it palatable by pretending that workers will have some impact on safety decisions. Yet:

the existence of committees are not necessary to obtain an exemption, but only to limit fines.

the committees have no real power to improve safety and health conditions -- they can only offer adivce which the employer will take or leave at his pleasure.

their are no protections for committee members from employer retaliation.

Even is you were to coughen this section of the bill it would still fail unorganized workers.

The "state of the arts" in worker protection is the non-discrimination clauses in the NLRA, the Civil Rights Act, and the OSH Act. These are nice, but what worker can today afford to be unemployed ten years while litigation of discrimination charges grinds through the courts.

What workers, especially those without a contract, are going to offer one word of advice that contradicts management when then can be fired for it? As long as the full burden of proof lies on the worker no unorganised worker will exercise an independent thought on these committees.

Add to that the Senate's rejection (in the labor law reform act) of a move to make the employer share part of the burden of proof by providing workers with "injunctive relief" in discrimination cases and you have an adequate picture of the likelihood of improving S 2153 on behalf of these worker committees.

Worker participation as proposed in S 2153 is a sham, a deceit. Even if "state of the arts" protections were included these provisions would fail since protection against discrimination now is virtually meaningless.

CONCLUSION

Members of the committee -- in discussing this bill with committee staff I was told that our choice was to see OSHA dismembered with a meat axe or to have it operated on with a scalpel. He further told me that S 2153 was the foundation for such a surgical effort.

I would submit that using a scalpel to cut out the patient's heart has the same result as dismembering the patient with a meat axe -- the patient dies.

Why Senators like Williams, Cranston, and Church have given the veneer of respectability to anti-worker reactionaries like Schweiker and Hatch (presumably they are the axe wielders your staff referred to) is beyond SEJ's understanding.

The OSH Act as it is written is sufficient to protect workers once it is enforced. All of the complaints of the OSHA detractors can be ameliorated administratively -- and many have. If anything OSHA's budget should be dramatically increased so that they have somewhat more than $.03 to spend for the health and safety of each American worker.

S 2153 has to be seen for what it is -- an election year attempt by reactionary Senators and frightened liberals to curry the favor of corporate contributors and right-wing fringe -- at the expense of unorganized and unprotected workers. Surely there are Senators with sufficient integrity to see this unconscionable effort for what it is and who will vote for workers' safety and health by voting against S 2153.

APPENDIX ONE

We commented at the beginning of our testimony that worker death and disability was inflationary, more inflationary than regulation.

To date only two studies have been done dealing with the inflationary impact of not regulating a hazardous substance and both deal with the cotton dust standard.

The first prepared by the Department of Labor as a report to Congress is titled "Cotton Dust: Review of Alternative Technical Standards and Control Technologies", May 14, 1979. It concludes that the cost of avoiding a case of byssinosis under the new standard is between $7,540 and $8,658.

The report breaks new ground, however when it assesses the money saved by avoiding disability:

> "While the cost of government regulations have been measured for years, their economic benefits are seldom examined. In this case, for each disability avoided by the final standard, estimates have been made of reductions in earnings due to lost work time and early retirement, and direct medical expenses. The average expense per case of brown lung disease disability amounts to $100,852 for a total of $7.51 billion. This is a conservative estimate of benefits, since it does not include the losses to workers associated with premature death, pain and suffering, and other intangibles; or the expense to firms for increased health benefits, workers' compensation premiums, excess absenteeism, worker turnover, and reduced productivity; nor the costs externalized to society through transfer payments (both income and medical), including the cost of administering related government programs." (p. 11) (emphasis added)

The second study "Brown Lung Disability: Cost, Compensation, and Controversy prepared under USDL/ASPER contract #B-9-M-8-4664 attempts to estimate some of the costs not taken into account by the previous study. It concludes that nearly 80% of the costs of disability are born by taxpayers through social security, food stamps, etc, instead of by the companies through their workers' compensation carriers.

Both conclude that the benefits of regulating vastly outweigh the costs of regulating, SEJ strongly recommends that in every case where a standard is proposed an inflationary impact study of the effect of not regulating be done in parallel to the study of the inflationary impact of the proposed standard.

Likewise before gutting OSHA the committee should undertake a study comparing the benefits of lives saved by timely inspection to the costs incurred by the present process. It would be our expectation that such a comparison would demonstrate the economic desirability of the present OSH Act.

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May 12, 1980

Honorable Harrison A. Williams
Chairman
Labor & Human Resources Committee
United States Senate
4230 Dirksen Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

In preparing our testimony on S. 2153, Mr. Robert Mann of this firm contacted many of our clients asking for their input. His statement before the Committee reflects the views of those clients.

Dresser Industries supports S. 2153 and has written directly to the Committee so stating. Additionally, Mr. Mann received letters, copies of which are attached, from Akzona Inc., Tenneco Automotive, Trans Union Corporation, and Modine Manufacturing Company. We appreciate the Committee's willingness to include these additional letters in the hearing record. Further, North American Car Corporation has read our statement to the Committee and concurs with the views expressed in that statement. We would ask that the Committee note that concurrence and support for S. 2153 in the hearing record.

Again, we would like to express our thanks to you and to the members of the Committee for extending to us the opportunity to express our views regarding S. 2153.

Sincerely,

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON

BY Janine Perrignon
Janine Perrignon
Chief Legislative Liaison

cc: Robert E. Mann
Mark A. Lies

4/11/80

TRANS UNION CORPORATION

90 Half Day Road
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312/295 4259

Industrial Relations Department

April 9, 1980

Mr. Robert E. Mann
Seyfarth, Shaw, Fairweather & Geraldson
55 East Monroe Street
Chicago, IL 60603

Dear Bob:

I welcome an opportunity to express my support for the Occupational Safety and Health Improvement Act of 1979 (S2153). OSHA can and should be improved! Senator Schweiker's approach is an important step, and it's in the right direction.

Since 1950, except for a stint in Korea, I have been personally involved in developing and administering industrial accident prevention and workers compensation programs. Many of the edicts promulgated by OSHA have been very helpful in reducing the risk of injury and illness. Others have been very onerous and they are of questionable value. Unfortunately the adversarial relationship that has developed is counterproductive and S2153 could dramatically improve the state that now exists.

I understand you will soon have an opportunity to appear before the U.S. Senate Labor and Human Resource Committee, and I urge that you support the concept of creating incentives for employers and employees to achieve improved occupational safety and health performance.

There is ample evidence from the behavioral sciences, e.g. studies by Skinner, et.al., that positive reinforcement is one of the most effective means to motivate. Today, many companies such as ours are searching for ways to improve employee performance and productivity, and the Occupational Safety and Health Improvement Act of 1979 could be an important tool. Government could use it to reward positive behavior of employers and employees.

Mr. Robert E. Mann
Page Two
April 9, 1980

Nowhere in the current law can I find provisions to provide positive reinforcement, and I can find numerous examples of punishment. I do hope that your remarks before the Senate Labor and Human Resource Committee will act as a catalyst to improve OSHA, and I am taking the liberty of enclosing an excerpt on positive reinforcement entitled "Setting Up a Positive Reinforcement Program in Industry" from Psychological Foundations of Organizational Behavior.

I don't want to belabor the behavioral sciences, but quite candidly I do not believe OSHA will achieve the laudable objectives that we all seek by punishment alone. Therefore, in the remote possibility that my insights might be of some help, I am additionally enclosing an excerpt on "Positive and Negative Reinforcers" from Learning: A Survey of Psychological Interpretations by Winfred F. Hill, which explains why Skinner regards punishment as a poor method of controlling behavior. Good luck!

Sincerely,

John Dolan

John F. Dolan
Director, Industrial Relations

JFD:br
Attachments

PSYCHOLOGICAL FOUNDATIONS OF ORGANIZATIONAL BEHAVIOR

Edited by Barry M. Staw, Northwestern University
Goodyear Publishing Company, Inc. Santa Monica, 1977
Pages 42-45

Setting Up a Positive Reinforcement Program in Industry

Many organizations are setting up formal motivational programs in an attempt to use the principles of positive reinforcement to increase employee productivity.

A positive reinforcement approach to management differs from traditional motivational theories in two basic ways. First, as noted above, a positive reinforcement program calls for the maximum use of reinforcement and the minimum use of punishment. Punishment tends to leave the individual feeling controlled and coerced. Second, a positive reinforcement program avoids psychological probing into the worker's attitudes as a possible cause of behavior. Instead, the work situation itself is analyzed, with the focus on the reward contingencies that cause a worker to act the way in which he does.

A positive reinforcement program, therefore, is results oriented rather than process oriented. Geary A. Rummler, president of Praxis Corporation, a management consultant firm, claims that the motivational theories of such behavioral scientists as Herzberg and Maslow, which stress workers' psychological needs, are impractical. "They can't be made operative. While they help classify a problem, a positive reinforcement program leads to solutions."

Stages in Program Development

Positive reinforcement programs currently used in industry generally involve at least four stages. The *first stage*, according to Edward J. Feeney, formerly vice president, systems, of Emery Air Freight Corporation, is to define the behavioral aspects of performance and do a performance audit. This step is potentially one of the most difficult, since some companies do not have a formal performance evaluation program, especially for nonmanagerial employees, and those that do have a program often rate the employee's behavior on nonjob-related measures (such as friendliness, loyalty, cooperation, overall attitude, and so on). But once these behavioral aspects are defined the task of convincing managers that improvement is needed and of persuading them to cooperate with such a program is simplified. Feeney asserts, "Most managers genuinely think that operations in their bailiwick are doing well; a performance audit that proves they're not comes as a real and unpleasant surprise."

The *second stage* in developing a working positive reinforcement program is to develop and set specific goals for each worker. Failure to specify concrete behavioral goals is a major reason many programs do not work. Goals should be expressed in such terms as "decreased employee turnover" or "schedules met" rather than only in terms of "better identification with the company" or "increased job satisfaction." The goals set, therefore, should be in the same terms as those defined in the performance audit, goals that specifically relate to the task at hand. Goals should be reasonable—that is, set somewhere between "where you are" (as spelled out in the performance audit) and some ideal.

While it is important for the manager to set goals, it is also important for the employee to accept them. An approach that tends to build in goal acceptance is to allow employees to work with management in setting work goals. According to John C. Emery, president of Emery Air Freight Corporation, the use of a participatory management technique to enlist the ideas of those performing the job not only results in their acceptance of goals, but also stimulates them to come up with goals.

The *third stage* in a positive reinforcement program is to allow the employee to keep a record of his or her own work. This process of self-feedback maintains a continuous schedule of reinforcement for the worker and helps him obtain intrinsic reinforcement from the task itself. Where employees can total their own results, they can see whether they are meeting their goals and whether they are improving over their previous performance level (as measured in the performance audit stage). In other words, the worker has two chances of being successful—either by beating

E. D. Grady, general manager-operator services for Michigan Bell, maintains that the manager should set up the work environment in such a way that people have a chance to succeed. One way to do this, he says, is to "shorten the success interval." Grady says, "If you're looking for success, keep shortening the interval of measurement so you can get a greater chance of success which you can latch on to for positive reinforcements." Instead of setting monthly or quarterly goals, for example, set weekly or daily goals.

The *fourth stage*—the most important step in a positive reinforcement program—is one that separates it from all other motivation plans. The supervisor looks at the self-feedback report of the employee and/or other indications of performance (sales records, for example) and then praises the positive aspects of the employee's performance (as determined by the performance audit and subsequent goal setting). This extrinsic reinforcement should strengthen the desired performance, while the withholding of praise for substandard performance should give the employee incentive to improve that performance level. Since the worker already knows the areas of his or her deficiencies, there is no reason for the supervisor to criticize the employee. In other words, negative feedback is self-induced, whereas positive feedback comes from both internal and external sources.

As noted previously, this approach to feedback follows the teachings of B. F. Skinner, who believes that use of positive reinforcement leads to a greater feeling of self-control, while the avoidance of negative reinforcement keeps the individual from feeling controlled or coerced. Skinner says, "You can get the same effect if the supervisor simply discovers things being done right and says something like 'Good, I see you're doing it the way that works best.' "

While the feedback initially used in step four of the positive reinforcement program is praise, it is important to note that other forms of reinforcement can have the same effect. M. W. Warren, the director of organization and management development at the Questor Corporation, says that the five "reinforcers" he finds most effective are (1) money (but only when it is a consequence of a specific performance and when the relation to the performance is known); (2) praise or recognition; (3) freedom to choose one's own activity; (4) opportunity to see oneself become better, more important, or more useful; and (5) power to influence both coworkers and management. Warren states, "By building these reinforcers into programs at various facilities, Questor is getting results." The need for using more than praise after the positive reinforcement program has proved effective is discussed by Skinner.

> It does not cost the company anything to use praise rather than blame, but if the company then makes a great deal more money that way, the worker may seem to be getting gypped. However, the welfare of the worker depends on the welfare of the company, and if the company is smart enough to distribute some of the fruits of positive reinforcement in the form of higher wages and better fringe benefits, everybody gains from the supervisor's use of positive reinforcements. (*Organizational Dynamics*, Winter 1973, p. 35.)

SELECTED BIBLIOGRAPHY

For an understandable view of Skinner's basic ideas in his own words, see B. F. Skinner's *Contingencies of Reinforcement* (Appleton-Century-Crofts, 1969) and Carl R. Rogers and B. F. Skinner's "Some Issues Concerning the Control of Human Behavior" *Science* 24 (1965): 1057–66. For Skinner's views on the applications of his ideas in industry see "An Interview with B. F. Skinner, *Organizational Dynamics*, Winter (1973): 31–40.

For an account of Skinner's ideas in action, see the same issue of *Organizational Dynamics* (pp. 41–50) and "Where Skinner's Theories Work," *Business Week*, December 2, 1972, pp. 64–69.

An article highly critical of the application of Skinner's ideas in industry is W. F. Whyte's "Pigeons, Persons, and Piece Rates," *Psychology Today*, April 1972, pp. 67–68. For a more sympathetic and more systematic treatment see W. R. Nord's "Beyond the Teaching Machine: The Negative Area of Operant Conditioning" in *The Theory and Practice of Management, Organizational Behavior and Human Performance*, No. 4 (1969), pp. 375–401.

For previous comments on behavior modification by the author, see W. Clay Hamner, "Reinforcement Theory and Contingency Management" in L. Tosi and W. Clay Hamner, eds., *Organizational Behavior and Management: A Contingency Approach* (St. Clair Press, 1974), pp. 188–204 and W. Clay Hamner's "Worker Motivation Programs: Importance of Climate Structure and Performance Consequences" in W. Clay Hamner and Frank L. Schmidt, *Contemporary Problems in Personnel* (St. Clair Press, 1974), pp. 280–308.

Last, the best discussion of the general subject of pay and performance is Edward E. Lawler III, *Pay and Organizational Effectiveness* (McGraw-Hill, 1971).

LEARNING: A SURVEY OF PSYCHOLOGICAL INTERPRETATIONS

Third Edition
By Winfred F. Hill, Northwestern University
Thomas Y. Crowell Company, New York, 1977
Pages 84-87

Positive and Negative Reinforcers

Although Skinner is largely concerned with *positive reinforcers*, he also recognizes the existence of *negative reinforcers*. Negative reinforcers are aversive stimuli, ones that the individual commonly seeks to avoid. The *removal* of a negative reinforcer increases the probability of the preceding response, just as does the *presentation* of a positive reinforcer. Electric shock, for example, is a negative reinforcer because the termination of the shock is reinforcing. Thus a response can be reinforced either by presenting a positive reinforcer or by removing a negative one.

An important point about reinforcers, both positive and negative, is that they can be conditioned. If a stimulus occurs repeatedly with a positive reinforcer, it tends itself to acquire the capacity to reinforce behavior. It then is called a conditioned positive reinforcer. A sign reading "Restaurant" will serve as a conditioned positive reinforcer for a hungry person in a strange city, because such signs have been associated with food in the past. Similarly, a stimulus that occurs with a negative reinforcer tends to become a conditioned negative reinforcer, as in the familiar case of the burnt child who learns to avoid the stove even when it is cold.

The topic of negative reinforcement is obviously related to punishment, but the exact relation is not obvious. Negative reinforcement results from the removal of a negative reinforcer, whereas punishment involves the *presentation* of a negative reinforcer. (The reader should be warned that some other writers have used these same terms with somewhat different meanings, which can be confusing, but Skinner is not to blame for that.) What effects does punishment have, and how are these effects produced? Skinner points out that punishment is not a very reliable way of preventing responses from occurring. Reinforcement increases the probability of a response, but punishment does not necessarily reduce the probability. When it does, the reduction may result from any of three reasons.

First, the aversive stimulus used as punishment is likely to have emotional effects. These emotional effects are respondent behavior. In addition to whatever specific respondents an aversive stimulus may elicit (jerking back the hand that has just touched a hot stove, for example), it is likely also to elicit more general, emotional respondents. These respondents may include both observable, external responses, such as crying or trembling, and such less easily observable ones as a pounding heart and rapid respiration. These various emotional respondents are likely to be incompatible with the punished response, so that they reduce its probability of occurrence. For example, if scolding a child for eating forbidden candy makes him cry, it is likely also to stop his eating, since it is difficult to eat and cry at the same time. This effect, however, is temporary. When the aversive stimulus is removed the emotional effects soon dissipate. The punished behavior then occurs again, often at an even higher rate than before punishment. So, although this effect of punishment is often useful in stopping undesirable behavior, it is not useful in keeping it from hap-

The second effect of punishment is an extension of the first. When a neutral stimulus is paired with an aversive stimulus that elicits a respondent, this is a conditioning situation. Whatever stimuli are present when punishment occurs thus have a chance to become conditioned stimuli for the emotional responses to punishment. These conditioned stimuli would then produce emotional respondents in the absence of the original punishment. As a result, the previously punished response would tend to be replaced by these competing responses, much as if punishment were still being presented. In our previous example, the child would tend to be frightened (make emotional responses) as soon as he touched the forbidden candy that had previously been paired with punishment. This fear would inhibit his eating responses. This effect of punishment, though basically similar to the first, is thus more lasting in its effects.

The third effect of punishment is an application of negative reinforcement based on the conditioned aversive stimuli from the second effect. When the individual turns away from the conditioned aversive stimuli, this act removes these stimuli and provides negative reinforcement. He is thus reinforced for making a response (turning away) that is incompatible with the punished response. As a result, he learns to turn away instead of making the punished response. Once stimuli from the forbidden candy became aversive to the child, he was reinforced for anything that got him away from these stimuli. Since getting away from these stimuli is incompatible with approaching them, he was learning not to eat the forbidden candy. This process, somewhat similar to Guthrie's interpretation of punishment, is what disciplinarians usually hope to accomplish by punishment. However, this effect, like the second one, lasts only until the conditioned aversiveness of the stimuli extinguishes. To maintain this effect, the disciplinarian must be prepared to give further punishments as needed to maintain the new behavior.

In general, Skinner regards punishment as a poor method of controlling behavior. For one thing, it is deceptive, since the first of its three effects often makes it appear dramatically successful when in fact it has produced only a temporary effect. For another thing, the emotional behavior it produces is likely to be undesirable from other points of view. Replacing misbehavior with crying or anger is seldom a good solution. Finally, the emotional responses may become conditioned to stimuli other than the ones the punisher wishes, including the stimuli of the punisher. For example, a child punished for some misbehavior in school may learn to respond with anger to the stimulus of the teacher or with avoidance to the whole school situation. For all of these reasons, punishment is both a rather unreliable technique for controlling behavior and one that is likely to have unfortunate side effects.

Nevertheless, Skinner would not claim that punishment is worthless as a device for changing behavior. When it is possible to arrange a situation so that punishment immediately follows the undesirable behavior, but does not occur at other times, it may be effective in suppressing undesirable behavior without producing harmful side effects. Under such conditions of very specific punishment, the individual learns emotional respondents and operant avoidance responses only to stimuli closely associated with the punished behavior. Since the person is exposed to all the other stimuli in the situation at other times when he is not being punished, whatever responses he learns to these other stimuli soon extinguish. However, such carefully arranged punishment situations are hard to maintain, and are a far cry from the haphazard and sometimes vengeful way that punishment is commonly used in everyday life. So in spite of some noteworthy exceptions, in general Skinner maintains that punishment is usually a poor method for modifying someone's behavior.

Akzona
INCORPORATED, ASHEVILLE, N.C. 28802

OPERATING COMPANIES
AMERICAN ENKA CO
ARMAK CO
[illegible]
BRAND-REX CO
INTERNATIONAL SALT CO
ORGANON INC

March 14, 1980

The Honorable Gaylord Nelson
United States Senate
221 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Nelson:

Re: S.2153

Since the establishment of the Occupational Safety and Health Administration, that agency has spent $1.5 billion in operating expenses while industry has spent more than $25 billion to comply with OSHA safety regulations. During the same period, however, the number of serious injuries in America's work places has actually gone up.

Although Akzona has not had such an increase in accident rate, we have certainly shared in the increased costs required in complying with the often unrealistic regulations imposed by OSHA. Our plant in Wisconsin at Sheboygan provides some 380 jobs which really have been made no safer and possibly less secure by OSHA regulations.

Surely in this situation a good faith effort to concentrate safety efforts where they are needed should not be labeled as "deadly for workers," but as highly constructive and desirable. By concentrating on work places with poor safety records, OSHA could actually help rather than harass and make a real contribution to improved safety because you may be sure that work places with good safety records are already concentrating on safety. In our experience with 56 plants in 19 states and five foreign countries, I can assure you that a good safety record is no accident but something which we work on and monitor constantly.

Accordingly, we urge you to study carefully and to support Senator Schweiker's Bill, S.2153. When everyone is giving lip service to the desirability of reducing unneeded and expensive government regulations, it is hard to imagine a better opportunity to put up or shut up than the OSHA reforms contemplated by the Occupational Safety and Health Improvements Act of 1980 (S.2153). We think it deserves the bipartisan support it has already received and we hope that will include you when it comes to a vote.

Sincerely,

Maurice H. Winger

Maurice H. Winger, Jr.
Vice Chairman

MHWJr/dmm

4/18/80
P.H.
file
[illegible]

Akzona
INCORPORATED, ASHEVILLE, N.C. 28802

OPERATING COMPANIES:
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ORGANON INC.

April 15, 1980

Mr. Robert E. Mann
Seyfarth, Shaw, Fairweather &
  Geraldson
55 East Monroe Street
Chicago, Illinois 60603

Dear Bob:

Thanks for your letters of March 25 and April 4 in regard to Senate Bill 2153. On receipt of your first letter I raised the issue with Mr. Winger, the Vice Chairman of our Board at Akzona. Mr. Winger had already written some 35 letters to Senators in states in which we have operating facilities.

Thus, in answer to your second letter--yes, Akzona does wholeheartedly support the Schweiker Amendment and yes, you may submit the attached letter as part of your written presentations if you so desire. As indicated, similar letters were sent in Akzona's name to approximately 35 other Senators.

I apologize for the delay in responding to your request, but hope the enclosed can be of some use in at least a post-hearing submission.

Regards,

J. K. MacKendree Day
Attorney

Attachment:
  Copy of M. H. Winger's
  letter of 3/14/80 to
  Senator Nelson

JKMD:mb

Tenneco Automotive
A Tenneco Company

Suite 400
108 Wilmot Road
Deerfield, Illinois 60015
(312) 948-0800

April 9, 1980

Mr. Robert E. Mann
Seyfarth, Shaw, Fairweather &
Geraldson
55 East Monroe Street
Chicago, Illinois 60603

Dear Bob:

Tenneco Automotive would like to comment and encourage favorable action on Senate Bill 2153 sponsored by Richard Schweiker. We are in favor of the clause which would set up a mechanism for handling certain employee safety complaints without an on-site inspection. We understand to be eligible for the beneficial aspects of the proposed amendment, an employer would be required to establish and maintain an effective employee safety committee.

Tenneco Automotive is a Division of Tenneco Inc. Tenneco Automotive administers Walker Manufacturing Company (a manufacturer of exhaust systems, catalytic converters, truck axle parts and automotive lifting equipment) and Monroe Auto Equipment Company (a manufacturer of automotive, aircraft and industrial shock absorbing devices). We also administer Speedy Muffler King, a retail service outlet for exhaust systems and shock absorbers. We have 14 manufacturing plants in the United States and plants in Canada and overseas. We have several hundred Speedy Muffler King outlets.

We support the Bill and its amendments because it provides an incentive for more effective internal vigilance and safety. We realize we must monitor and enforce requirements within our organization and we have areas which require this.

We believe the amendments and Bill 2153 can save our time and increase efficiency and will also save time and effort for OSHA and allow them to apply themselves more effectively where needed.

The concept of the amendments is analogous to awarding safe drivers with reduced insurance rates (i.e. companies with bona fide good safety records would be spared the inconvenience of repeated investigations).

Sincerely,

Robert A. Heath
Director of Government and
Consumer Affairs

RAH/mm

MODINE

MODINE MANUFACTURING COMPANY · [illegible]

March 28, 1980

Robert E. Mann, Esq.
Seyfarth, Shaw, Fairweather & Geraldson
55 East Monroe Street
Chicago, Illinois 60603

Re: Senate Hearing on OSHA

Dear Bob:

Modine fully supports S.2153 to amend the OSH Act. Enclosed is a copy of a letter we previously submitted to our Senators. As you will note, it highlights the infamous screwdriver case you handled for us.

We will submit an additional copy to the Senate Committee. Also, if Seyfarth, Shaw, Fairweather & Geraldson plans to participate in the hearings, please feel free to cite Modine's experience with OSHA if you think it would be helpful.

This legislation is a very promising step in the right direction and, hopefully, if enough employers support it, we can obtain some worthwhile reforms.

Very truly yours,

Kim A. Wehrenberg

K. A. Wehrenberg

KAW:lec
Enclosure

March 25, 1980

The Honorable William Proxmire
United States Senate
Dirksen Building
Room 5241
Washington, DC 20510

Re: OSHA Improvements Act

Dear Senator Proxmire:

Modine Manufacturing Company would like to urge you to support the "OSHA Improvements Act", Senate Bill S.2153. Reform of the thrust and enforcement of OSHA law is urgently needed as evidenced by skyrocketing employer compliance costs but with no corresponding improvement in employee safety! In fact, much of what OSHA has been doing is actually counterproductive because it diverts substantial sums of money from employer safety programs into expenditures for complying with nit-picking, non-safety related, OSHA regulations and into contesting unjustified OSHA citations or simply to pay punitive OSHA fines.

Modine is a medium sized manufacturer of heat transfer products and we employ about 3,500 people. We speak from experience when it comes to dealing with OSHA. Modine has recently received niggling and unwarranted OSHA citations attempting to impose substantial fines. For example, one of our employees recently left a screwdriver in a punch press and when he subsequently ran the press it mashed the screwdriver and did several thousand dollars damage to the punch press die. We immediately suspended the employee for three days without pay for negligent conduct and also to impress upon the employee the need to be alert and careful around potentially dangerous machinery. The employee's union demanded that the employee not be disciplined and be given back pay and threatened that if we refused they would "call in OSHA". We refused and they complained to OSHA which, after a quick inspection, immediately issued a citation to the Company for requiring employees to use screwdrivers to remove parts from the punch press (which we require instead of having employees put their hands in the press). OSHA did not investigate the validity of the complaint and did not cite a particular safety regulation (because there is none), but instead alleged Modine violated the general duty clause to provide a safe work place. We were shocked and astounded, to say the least. We elected to exercise our legal rights and contested the citation rather than pay OSHA's punitive and totally unjustifed fine.

OSHA dragged us through long and expensive legal preparation and on several occasions resorted to delaying tactics. Then, after all our legal preparations were finally completed, they withdrew the citation and proposed penalty shortly before the hearing date because they knew they were not justified. On other occasions, OSHA's response to our contesting of their indefensible actions has been that if Modine was going to be a "hard case" we would have to suffer the consequences. Indeed, Modine has been subjected to a significant increase in the number of inspections and amount of fines OSHA has attempted to impose on us in the last year.

This intolerable abuse must stop! It is draining thousands of dollars as well as time and effort away from our and other Company's safety programs. The only effective way to accomplish this urgently needed reform is to amend the OSHA law. Bill S.2153 is a good first step in this direction which in part relaxes inspection by OSHA of those plants maintaining good safety records. We urge you to wholeheartedly support the OSHA Improvements Act and to urge your colleagues to do the same. The present misguided thrust of the Act has added millions of dollars of cost to American products without improving safety conditions and in fact has diverted money and resources from desirable and beneficial safety programs of employers. Your help is earnestly requested to enact S.2153 to improve OSHA law.

Sincerely,

JED:lac

bcc: NAM
1776 F Street, N. W.
Washington, DC 20006

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC.
1101 CONNECTICUT AVENUE, N.W., SUITE 300, WASHINGTON, D.C. 20036
TWX: 710-822-9489
TEL: 202/862-0500

May 13, 1980

Hon. Harrison A. Williams, Jr.
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Re: Occupational Safety and Health Improvements Act of 1980-S.2153

Dear Mr. Chairman:

We respectfully request that this letter expressing our views on S.2153 be made a part of the record of the Committee's hearings on this bill.

The American Textile Manufacturers Institute (ATMI) is the national trade association for the American textile industry and represents approximately 80 percent of the spinning, weaving, knitting and finishing production capacity in the industry. ATMI provides governmental, economic, international trade, occupational safety and health, statistical, public relations and other services to this industry.

The American textile industry represents a major industrial segment of the national economy, and its approximately one million employees include 46 percent women and 29 percent minorities.

The textile industry continues to take a positive approach toward occupational safety and health. Some measure of the success of that approach is evidenced in the relatively low occupational injury rates reported by the Department of Labor through its Bureau of Labor Statistics (BLS). For 1978, BLS reports the 1978 incidence of injury per 100 full-time workers in the textile mill products sector (SIC 22) at 10.0 compared to 12.8 for all manufacturing. This record also is a measure of the industry's concern and interest in the health, safety and welfare of its employees.

The Occupational Safety and Health Improvements Act of 1980, S.2153, is based upon a concept which we support. Exempting workplace facilities from compliance inspections and investigations so long as they maintain a safe workplace environment as evidenced in good safety performance will permit application of compliance efforts where they are most needed, at those facilities where the safety performance record is poor and the high injury levels obviously need someone's attention. This will permit maximum effective use of enforcement resources which have finite limits in terms of personnel and frequency of possible inspections.

The placement of limits on the fines which can be levied on qualifying safer facilities for compliance violations offers some incentive for non-qualifying facilities to seek a safer performance level.

The approach also provides an incentive for employers to apply their own creative talents directed toward the real target of any standard, achievement of safer performance. It would avoid interference from the policing agency. It would discourage the imposition of picayune and perhaps non-germane enforcement requirements.

As good as the concept appears, the procedural provisions for accomplishment appear cumbersome and the web of safeguards could actually discourage managers of qualifying facilities from attempting to formalize qualification. Furthermore, even the caveats designed to safeguard primary enforcement needs envisaged by the Occupational Safety and Health Administration (OSHA) of the Department of Labor appear so broad as to assure OSHA complete freedom of action in the compliance area. Therefore, unless significant changes are made in these procedural matters, we do not believe that S.2153 can accomplish what it proposes for safer establishments.

For this legislation to function successfully, we suggest several procedural modifications. First, the basic annual lost workday injuries qualification level should be raised above 2 per 100 employees. At the 2 level, very few establishments could qualify. Furthermore, qualification levels must be within practicable reach for employers to even try for qualification. (For all manufacturing, average incidence is 12.8 versus 10.0 for textile products). If successful a later reduction might be in order, perhaps at the 1985 review when continuation would have to be positively acted upon.

Secondly, the process of selecting an advisory safety committee should be simplified to be more conducive to an atmosphere of cooperation and non-adversarial.

Thirdly, the consultation process should be so structured to permit and encourage employers to develop their own internal consultation expertise.

In conclusion, we commend the authors of this legislation for its conceptual simplicity and correctness of the injury performance approach. We have grave doubts that it can accomplish its stated goals without realistic procedural modifications such as suggested above.

Thank you for the opportunity of submitting these views.

Sincerely,

W. Ray Shockley
Executive Vice President

WRS/hk

STATEMENT OF MOTOROLA, INC. ON S. 2153, THE OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980, TO THE LABOR AND HUMAN RESOURCES COMMITTEE OF THE UNITED STATES SENATE

My name is Terry Cooper. I am currently Assistant Director of Congressional Relations for Motorola, Inc. but my education, training and experience are in labor law and employee relations. For three years, from February 1976 until January 1979, I served as Motorola's Assistant Director of Employee Relations. In that position my responsibilities included direction of Motorola's occupational safety and health programs.

We at Motorola appreciate very much the opportunity Chairman Williams has accorded us to express our support for the principles behind S. 2153: to encourage and reward employers' voluntary efforts to provide safe workplaces and to direct OSHA's investigatory resources to the workplaces that need them most.

No major Motorola manufacturing facility would be exempted from routine OSHA inspections as a result of this bill, for all had more than two lost workday injuries per 100 employees in 1979. Our corporate over-all average that year was 2.96 such injuries per 100 employees. But I am convinced that, by giving us a realistic improvement target to aim at, it will spur us to redouble our efforts to reduce our injury rate throughout the corporation. We know we can do it. In 1975 our company-wide average was 1.93, and we received the National Safety Council's Award of Merit. In addition, the bill would prevent a recurrence of the type of OSHA inspection that we encountered last year here in Washington.

Our Washington office is not unlike other organizations' Washington offices: we convert blank sheets of paper into sheets of paper with words and numbers on them. So long as one is discreet about the words one puts on those sheets of paper, it is not, in my experience, a particularly hazardous industry. And, I am told, our only workplace injury in the previous two years had been over a year before when one young lady bumped her head on a shelf. The shelf was removed immediately.

In January 1979 our Washington office was inspected by an OSHA inspector who had come down from Philadelphia solely for the purpose of inspecting us. He told us he was responding to a complaint, allegedly filed by an unnamed "friend of an employee," that the noise caused by the ringing of the telephones in a particular area of the office violated OSHA's noise standard.

He assured us that there was nothing to worry about, that he had never heard of and couldn't imagine a situation where telephone ringing would exceed the noise standard. But, he said, he was obliged to inspect just to be sure. So he attached dosimeters--electronic noise-measuring devices--to approximately three of the people working in that area. He then conducted a wall-to-wall inspection of the entire office.

Having done that, he apparently had nothing to do until the dosimeters had measured the noise level over an eight-hour period, which would be sometime the next day. As a result, for the balance of that day and half the next he circulated around the office looking for people with whom to chat. He distracted many of us from our work repeatedly.

When the dosimeter readings were completed, he told us that we were well within the standard. As I recall, he said that the noise level was approximately 55 decibels at the highest. The standard is 90.

I am not suggesting that our experience was typical. I hope it was not. But, on the other hand, I cannot believe that ours was the only workplace to have had such an experience.

We at Motorola understand and share the concerns of many adherents of workplace safety that reporting this limited bill out of committee will give opponents of OSHA a vehicle with which to gut or even abolish the agency. I pledge our efforts to prevent that from happening. We, too, support a reduction in workplace injuries, as is evidenced by these facts:

- We have had formal occupational safety programs since 1937, 33 years before the passage of the Occupational Safety and Health Act.
- We employ twenty safety professionals and thirty registered nurses.

In many respects, though, we must rely on the developing expertise of OSHA and NIOSH, particularly in the area of industrial hygiene. Expert agencies working to priorities can help us. Agencies that do not work to priorities are, to that extent, wasting the taxpayers' money. S. 2153 may require fine-tuning but its thrust is sound.

Thank you again for the opportunity to state Motorola's views.

STATEMENT

OF

THE MAYTAG COMPANY

to the

Labor and Human Resources Committee

U.S. Senate

in reference to S.2153

"Occupational Safety and Health Improvements Act of 1980"

April 24, 1980

The Maytag Company appreciates the opportunity to submit this statement to the Labor and Human Resources Committee in support of S.2153, the "Occupational Safety and Health Improvements Act of 1980."

The Maytag Company manufacturers home laundry appliances, dishwashers and food waste disposers and employs approximately 2,700 people in our manufacturing plants in Hampton and Newton, Iowa. We strongly support S.2153 in view of our experience with the present Occupational Safety and Health Act, our conviction that the proposed reform measures would more accurately reflect the Congressional intent of the original Act and our belief that S.2153 would allow the Occupational Safety and Health Administration to concentrate its enforcement efforts towards high-risk workplaces.

The Maytag Company supports the basic purpose of the Occupational Safety and Health Act of 1970; that is, to provide a safe and healthful workplace. Historically we have given top priority to safety and health considerations and have always been committed to the importance of workplace safety and training. For many years prior to the enactment of the Occupational Safety and Health Act, Maytag followed applicable ANSI safety and health standards and our personnel participated in such safety and health associations as the National Safety Council, National Fire Protection Association, American Council of Governmental Hygienists and the American National Standards Institute. This commitment to safety is evidenced by our pre-OSHA safety record. The average rates of lost-time injuries per million hours worked from 1964-71 was 1.16 injuries. The national average during this period was approximately 7 times greater.

Our attitude towards safety and health is exemplified by the following excerpt from a 1974 report to our management. "The Maytag Company has had an effective safety and health program for its employees for many years and we view the requirements of OSHA as a supplement to our program and not as our total program by itself. In a great many areas our efforts far exceed those required by the law and while it is our intent to comply fully with all enacted legislation which govern our operations, we do not intend to lower our safety standards in the areas where we exceed Federal or State standards."

Indeed, we have complied with the occupational safety and health standards and have been the subject of many state and/or federal occupational and health inspections. Since 1972, when the Act's impact began to be reflected in costs to our company, Maytag's safety-related costs have jumped an average of 350 percent per year over our safety-related costs in the year prior to the Act. The number of lost-time injuries for every million hours worked has not been reduced, however. This injury ratio averaged 1.16 lost-time injuries per million hours worked for the 8 years (1964-1971) preceding OSHA's commencement date, and averaged 1.85 for the past 8 years following the Act's effective date, from 1972-1979. In 1979, the ratio was 1.99 lost-time injuries per million hours worked. From 1964 thru 1979, Maytag averaged approximately 6.5 million hours each year with a high of 7.5 million and a low of 5.6 million hours worked per year.

In other words, each year since the Occupational Safety and Health Act became law, The Maytag Company has been required to spend 3 1/2 times the yearly "pre OSHA" dollars spent on safety, yet we have not reduced the number of injuries in our workplace.

Everyone, including our company is experiencing serious problems as a result of the rising costs of energy. A comparison of the average annual energy cost increases incurred by Maytag with the additional costs of safety required by OSHA helps to put these costs into perspective. Since 1972 our costs of safety have exceeded our pre-OSHA costs by 350 percent per year. During the same period, our energy costs have increased by an average 18 percent per year.

These comparisons confirm that OSHA compliance resources directed towards The Maytag Company have not been an efficient use of OSHA's limited resources. By directing enforcement activities to high-risk areas, this proposed bill more accurately reflects the congressional intent of the original Act, and thereby provides needed direction to the reduction and elimination of American workplace hazards.

We disagree with those who state that this proposal will reduce the safety of the workplace. The employer's standard or duty to the provisions and regulations of the original Act is not diminished. Any reduction in safety standards would be reflected in the reports specified in subsection (b) of the proposed Act, thus disqualifying the employer for the safe workplace exemption granted by the Act.

We support the self-initiative and incentive that the bill provides for employers to qualify for the exemption and believe that the exemption will do far more to reduce workplace hazards than the current threat of inspection. We have always preferred the performance safety standards concept adopted by this bill, as opposed to specification standards. For many years we have been concerned that specification standards could lead to a reduction in the workplace safety standards that we have developed. As stated in the 1974 report, "[i]t must be recognized that the requirements and standards of the OSHA Act are the minimum standards which Industry must adhere to."

Our concern with specification standards is that they tend to become the only standard. Constant OSHA inspections give added momentum to this tendency, thereby making attempts to increase safety beyond these standards more difficult. With performance standards, however, the ability of a safety-conscious employer to construct safety programs beyond the minimal specification-type standard is increased. We support this bill because it is a step in that direction.

Keeping in mind that the 1970 Act did not reduce Maytag's injury rates, yet increased our costs by 350 percent, why should government regulation require us to incur these costs, then pass them along to our consumers, and, at the same time, reduce the safety of our workplace?

The Occupational Safety and Health Improvements Act of 1980 helps to reduce this type of misdirection of resources and over-regulation caused by routine OSHA inspections at workplaces whose safety records prove them to be safe. This saving of OSHA resources would allow OSHA to direct more attention to high-risk workplaces, while maintaining the workplace safety of those places of employment that qualify for the exemption provided by this proposal.

We thank you for this opportunity to submit these comments and urge the Committee to favorably report this legislation to the Senate.

Respectfully submitted,

Swanger

S. O. Swanger
Vice President, Manufacturing

STATEMENT OF

W. H. KROME GEORGE
CHAIRMAN OF THE BOARD AND CHIEF
EXECUTIVE OFFICER OF
ALUMINUM COMPANY OF AMERICA

TO THE
SENATE COMMITTEE ON
LABOR AND HUMAN RESOURCES

Mr. Chairman and Members of the Committee: I am W. H. Krome George, Chairman of the Board and Chief Executive Officer of the Aluminum Company of America. I appreciate the opportunity to submit for your hearing record some comments about S. 2153.

Alcoa concurs in the endorsement of the general principles of S. 2153 voiced by the U. S. Chamber of Commerce, the National Association of Manufacturers, and other associations to which we belong -- and, while we also share some of the concerns expressed by these organizations, we believe the legislation warrants positive support.

It is not my purpose here to restate those positions, but rather to share with you some thoughts about the establishment of advisory safety committees as encouraged under section 4.A(f)(2) of S. 2153. Alcoa has had experience with such committees. We have long recognized that the achievement of a safe and healthy workplace requires cooperative efforts of labor and management working jointly toward that end. In recognition of this reality, joint safety and health committees have been established within the framework of our contracts with United Steelworkers of American and Aluminum Workers International Union. These contractual relationships have been in effect since 1956, fourteen years before the existence of the Occupational Safety and Health Act. Where both parties have made the effort, the committees are working well and a cooperative problem-solving environment is established.

Simply mandating a joint safety committee (or an employee-only committee) will not guarantee a good safety and health program. Such a relationship requires a significant change in the usual management-labor environment. It calls for persistent and sustained efforts to change the adversarial relationship which often marks management-labor encounters and bring about a joint problem-solving association. Labor tends to commence the relationship with a list of "demands" which it often wishes to be instantly fulfilled. Management enters the arena highly concerned by a perceived threat to its right to manage.

Problems we have encountered in the change process have taught us:

1. The issues in such a committee's purview should be limited to safety and health matters. To use the committee to solve other matters under the guise of safety and health questions impedes effective action.

2. All problems cannot be resolved immediately and prioritization is necessary.

3. Such committees should be advisory to management.

Management must accept that:

1. It must be prepared to be response to the committee's advice.

2. It must recognize that it is expected to achieve the recommended goals on a reasonable timetable.

Awareness of and resolution of these problems is only a first step; ultimate success requires constant re-enforcement of the goal to create a safer workplace by jointly supported action. Health and safety results cannot be bargained; no one has the moral authority to trade off the health or safety of any worker for monetary or other considerations. This represents a radical departure from customary labor-management relationships. With full expectation and recognition of the problems, and with considerable patience, eventually joint management-labor safety and health cooperation can and does work.

Legislation should encourage both management and employees to make advisory committees successful. For that reason, I am concerned about section 4.A(f)(2)(E) of S. 2153 which allows employee representatives to choose not to participate on the committees and thereby deny the benefits of the bill's assessment reductions or exemptions provisions to the employer. This provision could disrupt already successful programs and has great potential for abuse.

In closing, I want to commend Chairman Williams, Senator Schweiker, and other sponsors of S. 2153 for this effort to improve the safety and health of our workplaces by dealing constructively with the Occupational Safety and Health Act. I believe there are few who can honestly deny the necessity to redirect the enforcement of this law toward the most hazardous workplaces. And yet, it is not the people who administer and enforce this law who are responsible for the health and safety of our workplaces. The people who manage and work in the workplaces share that responsibility. I applaud the recognition of that joint responsibility in S. 2153, and reiterate that while labor-management advisory committees may not solve all the safety and health questions, they can and will cultivate the type of responsibility necessary to most fairly address these questions. That approach is consistent with our way of government. It leaves to the citizenry the solutions of problems citizens can cope with themselves.

CATERPILLAR TRACTOR CO.

Vice President

Peoria, Illinois 61629

SENATOR
WILLIAMS, N.J.
1980 MAY 16 AM 11:39

May 13, 1980

The Honorable Harrison A. Williams
Chairman, Labor and Human Resources Committee
Dirksen Office Building
Washington, D.C. 20510

Dear Senator Williams:

We request that the attached Caterpillar Tractor Co. comments regarding S. 2153 (the Occupational Safety and Health Improvements Act of 1980) be placed in the record of proceedings.

Yours very truly,

C. N. Hathway

CNHathway
Telephone: (309) 675-5222
alb

Attachment

COMMENTS ON S. 2153 — May 13, 1980

Caterpillar Tractor Co. is a manufacturer of earthmoving and materials handling equipment and diesel engines — with manufacturing, sales and product support facilities in 15 countries and dealer outlets in more than 140 countries. In 1979, total corporate sales reached $7.6 billion. Our U.S. employment that year was 69,244.

We welcome this opportunity to submit testimony regarding the Occupational Safety and Health Improvements Act of 1980 (S. 2153). At the outset, we ask to go on record in support of the concept embodied in this measure. We believe S. 2153 is certainly a step in the right direction. However, we also recognize that additional adjustments must be made to the bill in order to achieve the sponsors' objectives. Our comments, while generally supportive of existing language, suggest several changes which we believe are needed.

Caterpillar is by no means a newcomer to the field of accident prevention. More than 130 safety professionals are stationed within U.S. Caterpillar facilities. Actually, our quest for safer work environments can be traced even further in history than the 50 years during which we've been an active member of the National Safety Council. And our record bears out the priority which we've placed on safety practices ... Caterpillar's "total case" lost work day incident rate has historically been well below that for our industry (SIC 35).

While Caterpillar has, over the years, supported the need for effective safety and health regulations, we question the present thrust of OSHA regulatory efforts. And we're not alone in our concern. Suggestions for improving OSHA have been offered by such groups as the President's Interagency Task Force on Workplace Safety and Health, the General Accounting Office, the Administrative Conference of the United States, and the Senate Committee on Governmental Affairs. There is an undeniable need to improve OSHA's policies and enforcement activities, yet the agency has shown an inability to redirect itself. For example, even reform attempts originating within the agency such as the ABC Concept and National Emphasis Program have not proven successful. Legislative mandate is the only remaining method of improving OSHA's effectiveness. The kind of reform effort represented by S. 2153 is most urgently needed. And we believe the benefits of this bill could be even further increased by inclusion of the suggestions which follow.

Inspection Exemption Provision

The inspection exemption provision within S. 2153 would direct OSHA's enforcement and compliance resources toward workplaces where improvement is most needed. Exempting establishments with effective safety programs, as demonstrated by performance measurements, should ensure that OSHA's efforts are focused on locations where serious hazards are more likely to exist. The suggested approach is not "waiting until a death or serious injury occurs" (as advanced by some critics of the proposal) but, rather, looking first to workplaces which represent the greatest potential for serious injury or death. OSHA and industry resources will be utilized much more effectively if such "targeting" of hazardous locations is utilized.

As a refinement of the inspection exemption concept, we suggest changing some minor aspects of the provision. We're concerned that the "workplace" definition proposed in S. 2153 is not consistent with the "establishment" definition or "workplace" concept presently utilized by the Bureau of Labor Statistics and the Occupational Safety and Health Administration data collection systems. The proposed "workplace" definition could be interpreted to require data reporting of distinctly separate activities on a basis which does not exist today. As a result, both large and small manufacturing and industrial operations could be burdened with an excessive and unnecessary amount of statistical reporting, whereas today only one report is required for each "establishment" (as defined by OSHA and BLS). Workers' compensation, OSHA and BLS data is not presently available for all distinctly separate activities. And we doubt that the inordinate amount of resources required to distill the proposed statistics could be justified.

We suggest that the inspection exemption concept be applied to the "establishment" level. We believe the effectiveness of safety performance at this level is the true measure of an exemption's validity.

Use of Workers' Compensation Data

There are a number of difficulties in utilizing workers' compensation (WC) data as the basis of an inspection exemption. Reporting requirements and definitions within state WC programs are not the same as those in BLS, OSHA, ANSI and other safety performance reporting systems. Workers' compensation data was not designed nor intended to provide an accurate indication of the relative effectiveness of an establishment's safety program. Reporting requirements vary from state to state, and thus the data submitted to OSHA may not be comparable. Such inconsistency could lead to an inequitable exemption mechanism.

We recommend that presently available BLS and OSHA data be used as the primary basis for exemption determination. In fact, employers currently compile the basic data needed to compute lost work day incidence rates in the annual OSHA Summary of Occupational Injuries and Illnesses (OSHA Form 200).

It would be a simple and inexpensive process for employers to submit to OSHA a copy of Form 200 with the necessary computations for an inspection exemption. The data contained in this document is a more accurate and representative indicator of relative safety performance than any available workers' compensation data. For these reasons, we recommend that the OSHA Form 200 be used as the basis for exemption determination. Also, automatic exemption mechanisms and levels could be established based upon the BLS Annual Occupational Injuries and Illnesses Survey.

On a related matter, uncertainty persists regarding the validity and desirability of the proposed exemption rate of two lost work days per 100 employees. Two questions arise. Should the definition of "lost work day injury" contained in S. 2153 include cases involving restricted work activity? And ... is the exemption level realistic?

In terms of the first question ... we trust the answer is No.

We urge that the most precise indicator of serious injury occurrence be utilized. And a lost work day incidence rate which excludes restricted work activity would appear to be the most precise, since many restrictions result from therapeutic and preventive medical procedures not directly related to seriousness of the injury. As the following BLS chart indicates, on a national basis restricted work activity constitutes an insignificant portion of total lost work day cases.

However, establishments with well run Medical departments, performing extensive therapeutic procedures, would be adversely affected by including restricted work day activity in the definition of "lost work day."

Table 8. Occupational injury incidence rates for lost workday cases, private sector, by industry division, United States, 1977 and 1978[1]

Industry	Incidence rates per 100 full-time workers 2/											
	Lost workday injuries						Lost workdays					
	Total cases		Cases involving days away from work 3/		Cases involving days of restricted work activity only		Total lost workdays		Number of days away from work		Number of days of restricted work activity 4/	
	1977	1978	1977	1978	1977	1978	1977	1978	1977	1978	1977	1978
Private sector 5/	3.7	4.0	3.5	3.7	0.2	0.3	60.0	62.1	56.0	57.4	4.0	4.7
Agriculture, forestry, and fishing 5/	4.6	5.2	4.7	5.1	.1	.1	90.8	78.5	75.3	74.2	5.1	3.1
Mining	5.9	6.6	5.7	6.0	.2	.6	130.5	142.5	125.7	136.5	3.6	7.8
Construction	5.8	5.7	5.7	6.2	.1	.1	109.7	108.1	106.0	103.3	3.7	4.8
Manufacturing	4.9	5.4	4.5	4.9	.4	.5	70.5	82.5	72.5	74.2	7.0	8.1
Transportation and public utilities	5.2	5.7	4.8	5.2	.4	.6	85.0	101.5	80.9	93.1	8.1	8.3
Wholesale and retail trade	2.9	3.1	2.8	3.0	.1	.1	63.5	44.3	41.1	41.6	2.1	2.7
Wholesale trade	3.5	3.9	3.4	3.7	.1	.2	51.9	50.8	60.0	52.0	2.9	5.0
Retail trade	2.6	2.8	2.6	2.7	(6)	.1	40.8	39.1	38.2	37.0	1.8	2.1
Finance, insurance, and real estate	.8	.8	.8	.8	(6)	(6)	10.2	12.1	9.6	11.5	.6	.8
Services	2.2	2.3	2.1	2.2	(6)	.1	36.2	35.4	32.7	33.5	1.5	1.8

[1] In order to maintain the comparability of the 1978 survey data with the data published in previous years, a statistical method was developed for generating the 1978 estimates to represent the small-unit farm employers in low-risk industries which were not surveyed. The estimating procedure involved averaging the data reported by small employers for the 1975, 1976, and 1977 annual surveys.

[2] The incidence rates represent the number of injuries or lost workdays per 100 full-time workers and were calculated as: (N/EH) X 200,000 where:

N = number of injuries or lost workdays
EH = total hours worked by all employees during the calendar year
200,000 = base for 100 full-time equivalent workers (working 40 hours per week, 50 weeks per year).

[3] Also includes cases which involved both days away from work and days of restricted work activity.

[4] The number of days of restricted work activity include those resulting from cases involving restricted work activity only and days resulting from cases involving days away from work and days of restricted work activity.

[5] Excludes farms with fewer than 11 employees.

[6] Incidence rates less than .05.

SOURCE: Bureau of Labor Statistics, U.S. Department of Labor.

The second question we ask involves the realism of the proposed exemption level. We're convinced that OSHA resources will not be significantly reallocated if the exemption rate is too low. The level must be achievable by a fair amount of employers in order to provide the needed positive incentives for continued improvement of existing safety programs.

We recommend that the exemption mechanism recognize both low hazard industries as well as those establishments in higher hazard industries which have established, proven safety programs. This can be accomplished by creating (1) an exemption level applicable to all establishments; and (2) additional exemption levels applicable on an industry-by-industry basis. Specifically, any establishment with a lost work day incident rate (as discussed earlier) of less than three could be exempted. Additionally, an establishment could be exempted if its lost work day incidence rate did not exceed one-half of its industry average.

Industry averages should be established by BLS using two or three digit Standard Industrial Classification data. Establishments with effective safety programs ... even those within high hazard industries ... deserve exemption, since they have demonstrated willingness and ability to effectively manage safety. OSHA involvement at facilities with effective safety programs will contribute little, if any, to increasing the existing safety programs' effectiveness. Positive incentives, which are sorely lacking in the present OSHA approach, must be provided. And an industry-based exemption will accomplish that purpose.

In summary, the exemption mechanism should be based upon precise indicators of serious injury occurrence and should provide objectives which are realistic and attainable.

Penalty Provision

The cost of compliance is usually much larger than OSHA penalties. Therefore, while we commend the sponsors for their concern, we must register our doubt that penalty reductions will have anything but minimum motivational effect. Far greater incentives for improving safety performance already exist ... for example, unwanted production disruptions when injuries occur as well as the very basic moral duty to provide safe workplaces.

Advisory Committee/Consultation Provision

Advisory Committees are not essential to effective safety programs. The effectiveness of an Advisory Committee is dependent upon the relationship which exists between employer and employees. A forced relationship will not function properly. Consequently, we believe the decision to initiate Advisory Committees must be made freely between employer and employee.

We also recommend that the bill's consultation provision be reconsidered. Specifically, we question the merit of excluding in-house safety and health professionals ... individuals with proven dedication and abilities. Outside consultants could not have the same level of expertise on a specific industry problem as the industry's own expert. (From a more practical point of view, we even doubt that sufficient non-industry safety professionals exist to satisfy the intent of the bill's consultation provision.) Industry safety professionals presently provide effective and objective consultation to their employers, and they should be recognized and allowed to continue within the scope of the proposed legislation.

Additional Considerations

The above comments address provisions of S. 2153. We suggest there are additional subject areas which should be covered in reform of OSHA.

Caterpillar recommends that consideration should also be given to:

-- Eliminating the adversary relationship which exists between OSHA and industry.

-- Providing additional positive incentives to encourage employers to improve existing safety programs.

-- Encouraging OSHA to more fully utilize performance requirements and standards rather than detailed specification standards.

-- Rethinking the current preference (in all cases) for engineering controls in light of the efficiency and cost-effectiveness of personal protective equipment.

Caterpillar appreciates the opportunity to offer comments on this important legislation. We support and encourage this committee's effort to develop and initiate methods of improving the occupational safety and health regulations.

DRESSER INDUSTRIES

DRESSER INDUSTRIES, INC. ▫ DRESSER BUILDING ▫ ELM AT AKARD ▫ DALLAS, TEXAS 75201

RALPH W. YTTERBERG
VICE PRESIDENT
INDUSTRIAL RELATIONS

EXECUTIVE OFFICES
214/[illegible]-6717

May 5, 1980

1980 MAY 9 AM 9 29
WILLIAMS, N.J.

Honorable Harrison A. Williams, Jr.
Chairman
Labor & Human Resources Committee
Room 4230
Dirksen Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

Dresser Industries wishes to express its support for most of the proposals contained in S. 2153, and requests that this statement of support be included in its entirety in the record of the hearings on this matter.

We at Dresser subscribe to the aims of Congress in passing the Occupational Safety and Health Act - the elimination of unnecessary hazards or risks to workers. It is because of this commitment that we support the aims of S. 2153 - providing additional incentives to employers to improve their safety records, and targeting enforcement efforts to workplaces where safety records indicate there is a lack of commitment to safety.

With respect to specific features of S. 2153, we strongly support the concept of exempting employers with exemplary safety records from routine safety inspections. This procedure provides incentive to employers to improve safety and directs OSHA activities to workplaces that are demonstrably less safe. However, we suggest that the criteria for such exemption be based on a comparison of like business activities. Some businesses are inherently more dangerous than others, so the exemption process will be fairer and more effective if this fact is recognized. For example, having the exemption apply to workplaces "having a lost day injury rate better than 20% of the industry average as listed in the BLS SIC Code" would be superior to the single standard now contained in Section 4A. (c)(1) of the bill.

With respect to the provisions for modification of certain penalties if a safety committee is in operation and/or a consultation program is followed, we feel that these will afford additional incentives for improving safety at the workplace. Dresser favors the use of safety committees, so long as they serve the use their name implies. Regarding the consultation program, we hope that some clarification can be made to permit employees of an employer who may not have formal qualifications but are nevertheless qualified by experience or training to be viewed as qualified for this purpose.

Regarding the provision for preliminary referral by OSHA of complaints as to safety matters by employees in workplaces with exemplary safety records to the employer for any necessary corrective action, Dresser strongly supports this idea. Not only does this provide incentive to employers to maintain safe workplaces, and target enforcement activities where likely to do the most good, but also removes an avenue of harassment by disgruntled individual employees and a source of unneeded irritation to employers. Dresser has locations with good safety records where repeated inspections have been made on account of groundless complaints.

In this connection, we also applaud the provision for limiting inspections of extra safe workplaces to the purpose of such inspection. Here again, enforcement time will be better targeted and safe employers will be spared unnecessary administrative expenses and irritations.

Honorable Harrison A. Williams, Jr.
Page 3
May 5, 1980

I would like to close by stating that most of the objections to S. 2153 of which we are aware seem to be misdirected. The bill is certainly not an attack on the principles of the Occupational Safety and Health Act, but rather an attempt to improve the Act by (1) introducing incentives for employers to strive harder in the safety area, and (2) directing OSHA resources to more productive areas. We reject contentions that the bill will lead to widespread lying and cheating by employers. Those few who might be tempted will likely be deterred by civil or criminal penalties.

In connection with some of the objections we have heard, it is possible that certain activities are so inherently dangerous and have such a bad history of compliance that they should be excluded from the exemption process.

Dresser sincerely hopes that S. 2153, with modifications as suggested earlier, be favorably reported out of Committee as soon as possible.

Very truly yours,

R. W. Ytterberg
Vice President
Industrial Relations

RWY/aj

AMAX

BERNARD R. ROY
CORPORATE DIRECTOR
LOSS PREVENTION

SENATOR
WILLIAMS, N.J.
1980 APR 23 AM 9 26

April 18, 1980

The Honorable Harrison A. Williams
Chairman
Committee on Labor and Human Resources
United States Senate
4230 Dirksen Building
Washington, D.C. 20510

Dear Mr. Chairman:

On March 17th our Mr. Philip E. Ruppe, AMAX Inc., Director of Washington Services requested an opportunity for AMAX to offer testimony on S-2153 during the scheduled OSHA hearings on April 15-17. Unfortunately, due to numerous similar requests from other companies and groups, your staff could not include us in the schedule. The testimony and remarks I and my AMAX colleagues prepared are attached for your review and consideration. We respectfully request that they be included in the hearing record.

As indicated to your staff, through our Washington office, I and my AMAX colleagues will be available to discuss our thoughts and concerns on S-2153 in greater detail with your staff. We look forward to this opportunity as we certainly share a common interest, namely the conservation of our human resources.

Sincerely yours,

Bernard R Roy

Bernard R. Roy

BRR/lfk

AMAX INC. · AMAX CENTER, GREENWICH, CONNECTICUT 06830 · TELEPHONE (203) 622-3000 · CABLES: AMAXMET, GREENWICH

Testimony on
Senate Bill S-2153

Presented at:
Washington, D.C.

My name is Bernard R. Roy. I am Corporate Director of Loss Prevention for AMAX Inc. in Greenwich, Connecticut. My responsibilities include occupational health, safety, security, and fire protection at the Corporate level. I am certified in the comprehensive practice of industrial hygiene by the American Board of Industrial Hygiene.

This is a partial text of remarks prepared by myself and my AMAX colleagues. AMAX Inc. is a diversifed natural resources company involved in developing and processing metals, fuels, agricultural chemicals, and marketing and distributing of these products worldwide. AMAX employs approximately 16,500 persons at offices, mines, plants and research facilities in more than 90 communities, predominantly in North America, Europe and Australia. Eleven of our major facilities, employing over 4,000 workers are currently under OSHA jurisdiction: three research and development laboratories and eight operations involved in refining copper, gold, lead, nickel, silver, zinc and the chemical conversion of molybdenum compounds.

This statement deals with four areas of Bill S-2153 that cause us concern; it also includes our comments on specific sections and subsections. We have read and analyzed S-2153 and interpretative materials such as the Congressional Record of Wednesday, December 19, 1979, the Chamber of Commerce of the United States Congressional Action Report of March 7, 1980 and articles from the Washington Post, The American Metal Market, and other trade publications. Although we agree wholeheartedly with the need to shift OSHA's emphasis from a punitive to a performance basis, we have serious reservations about S-2153 as written. Specific comments on the sections we take exception to are appended.

Today I would like to outline some of our major concerns with the bill as proposed and, time permitting, discuss AMAX's Health and Safety Policy, sections of our corporate Ten-Point Program and results of our loss prevention activities, to demonstrate that it is our total management committment, and not OSHA, that holds the key to accident and injury prevention.

Our four major concerns with S-2153 are:

1) unrealistic exemption goals - these goals fail to consider: (a) past record or (b) associated hazards of specific industries involved. They are revelant only for facilities that have already achieved an injury rate for serious injuries that approximates the national average.

2) incursion of federal bureaucracy into state jurisdiction - specifically Worker Compensation.

3) potential OSHA mandate for formation of joint management/labor safety committees.

4) apparent exclusion of industry experts such as Certified Safety Professionals and Certified Industrial Hygienists from consultant programs that could qualify the employer for penalty reductions.

* * * *

1) First, the goals outlined in the table on page five of the Bill are too ambitious. They will not encourage employers to achieve these goals on their own initiative or even in some instances to improve their occupational safety and health records. For example, an employer whose specific industry record is above the national average realistically may or may not be able to reduce his record to outlined goals.A lumber and wood products employer would have to reduce its injury record by 57%, according to the 1978 Incidence Rates published by the NSC, to achieve the national average while employers already below the national average might not have an incentive to improve under this bill.

We recommend that goals be set on the average for the industry involved (determined through National Safety Council or Bureau of Labor Statistics) and subsequently reduced via a timetable developed through the rule-making process. This would encourage negative contributors to improve and the positive contributors to set the pace.

2) Second, OSHA and/or the Federal bureaucracy could make section 4A(b) of S-2153 the initial step toward nationalizing state worker compensation programs. Entering into agreement with state agencies for injury statistics and allocating funds to provide such data could lead to the nationalization of these programs, as is occurring with state plans under PL 91-596. Moreover, OSHA, under section 8(c) of the act already requires employers to maintain records of their injuries; OSHA Form No. 200, must be kept for five years. Failure to maintain and post can result in issuance of citations and assessment of penalties. It would therefore appear that statistics are easily available, without duplication through state worker compensation programs.

3) Third, an implied mandate that joint labor/management safety committees be formed, meet, and make recommendations to management to improve safety worries us. These committees result from mutual agreements between management and the union. Responsive management has operated and continues to operate through such committees when they are effective. If they are mandated by rules issued by the regulatory agency - and rules inevitably follow the enactment of any act - plants may lose control of safety programs since OSHA could transfer its authority to these committees. We contend, Mr. Chairman, that the majority of people at the committee level are not ready to assume such responsibility because of their lack of training and experience in safety. We are very concerned with section (d)(1)(A) of S-2153.

4) Fourth, qualifications for consultants outlined in section (g) seem to exclude certifed safety and industrial hygiene professionals on the employer's staff. We maintain that a majority of the credit for the excellent safety records and programs in industry are due to the activities and expertise of these in-house experts. To exclude their advise in favor of worker committees and outside consultants who may not be as knowledgeable about the safety and health problems in a specific industry, would be a serious mistake. All board-certified safety or industrial hygiene professionals should qualify for the penalty limitations provided by S-2153.

* * * *

With respect to statistics, many conflicting reports have appeared in newsprint or in testimony at these hearings. At the end of each year Bureau of Labor statistics indicate that workday lost time injury rates have not improved. As a matter of fact, data published in the Interagency Task Force on Workplace Safety and Health, a task force established by President Carter in August 1977, indicate that injury rates have not decreased under OSHA; in fact, lost workday cases have increased 18 percent from 1972 to 1977. This conclusively demonstrate that the Congressional mandate in the Occupational Safety and Health Act of 1970 to reduce occupational injuries has not been met.

I believe that the above statistics show that safety cannot be legislated. Safety involves more than correction of unsafe conditions in accordance with a multitude of standards. It also involves the control of unsafe acts which many believe are the major causes of accidents. It involves employee attitudes, morale, behavior, all of which cannot be regulated and all of which, in our opinion, should be the concern of safety and health professionals who have been successful in achieving accident prevention goals.

Let me give you an example. The final report of the Interagency Task Force on Workplace Safety and Health mentioned that one of the Congress' goals in the Occupatinal Safety and Health Act of 1970 was to reduce occupational injuries by 50 percent. OSHA has not achieved this goal. In contrast, at AMAX we have reduced our lost time accident rate by 45 percent during the last five years, but these reductions cannot be credited to OSHA. As a matter of fact, our OSHA-regulated facilities have shown only an 11 percent improvement over the last 7 years. We probably would have been better off everywhere without OSHA.

In our opinion, the reductions we have achieved are due to our health and safety programs. A Corporate Health and Safety Policy signed by our president and our chief executive officer clearly states that the employees' safety and health is our first concern and responsibility. It assigns the responsibility for safety and health to all levels of management and to our employees. Our supervisors, superintendents and managers are rated on their safety performance.

To assist facilities in achieving safe, efficient production, we have staffed these facilities with health and safety professionals and provided them with guidelines for basic indoctrination of new employees, training workers on safety principles, inspection, accident investigations, protective equipment, safety procedures, communications, etc. We do not inundate facility management with pages of standards and harass them with compliance inspections; we find it more productive to provide them with professional guidance in safety and accident prevention principles.

In conclusion, Mr. Chairman, we cannot offer support for S-2153 in its present form. We wholeheartedly endorse your concept that employers with good safety records should be exempted from OSHA inspections. However, we feel that the goals outlined in the Bill are unrealistic. Above all, we are concerned about the inevitable rules that may mandate foundation of joint management/labor safety committees that in effect could destroy the effectiveness of existing safety programs within industry.

Bill S-2153
Comments By:
B. R. Roy
Corporate Director of Loss Prevention
AMAX, Inc.
Greenwich, Connecticut

The following comments on the Occupational Safety and Health Improvement Act of 1980 are submitted for your review and consideration:

"SEC. 4A."
(a)(1)(A)

Existing requirements (accidents resulting in a fatality or in hospitalization of five (5) or more employees - as outlined in 29 CFR Part 1904.8) - should be retained. The requirement that OSHA be notified of hospitalization involving more than one employee is overly restrictive - particularly if hospitalization is only for observation.

(a)(1)(B)

The phrase "Unless the danger is truly imminent, the information which gives the secretary reasonable grounds to believe such a danger or hazard exists", should be in writing and signed by the employee or his representative.

The intent of the Bill to limit OSHA inspections at facilities with good injury/illness records will be negated unless the potential to circumvent provisions in (a)(1)(B) is eliminated. This can be done by requiring written and signed complaints.

(a)(4)

The term "workplace" needs additional clarification. For example, in the section which reads, "...except that for employers engaged in activities which are physically dispersed, the term 'workplace' includes all locations at which such services are performed by employees of the employer engaged in such activities" could be interpreted to mean that all smelting, refining, manufacturing, etc. operations within a corporation should be grouped to determine exemptions. In our opinion, this qualification should limit the scope of "workplace" to those operations under the same local management; i.e. a plant may consist of production, maintanance, laboratory and shipping facilities. Certainly, the entirety should be the "workplace" and not four distinct and separate "workplaces".

(b)

This subsection is superfluous. The requirement listed under (c)(2) - that an employer file an affadavit under oath that his previous year's record qualifies him for exemption should be adequate. In addition the posting of the affadavit will inform all employees of the record claimed. To involve state worker's compensation systems would require more paperwork which is certainly against the intent of regulatory reform, and could serve as a basis to nationalize worker's compensation - another federal incursion into state jurisdiction.

(c)(1)

Although several of our facilities qualify for exemption under the numbers specified in the Number of Employees of the Workplace/Number of Loss Workday Injuries table, we feel these requirements are over-restrictive for certain operations. We would suggest that exemptions be based on the statistical average for the industry involved, with a sliding scale to reduce injuries to one-half or one-fourth the industry average in a five to ten year period, would be more in line with congress' mandate to reduce occupational injuries by 50 percent in a five year period.

(d)

The term "duty" should be deleted or defined: it is certainly ambiguious, connoting either management's responsibilities and obligations under this or other acts, or worker's duty to work safely, etc.

(d)(1)

We presume that inspections resulting in citation will be limited to those outlined in Section 4A(a)(1) and will not include routine or complaint instigated inspections that should have been exempted to begin with. Moreover, the employer should qualify for penalty reduction if he maintains an advisory safety committee and a regular consultation program, regardless of whether or not he qualifies for exemption under the injury illness statistics.

(f)(1)

If the employer is given leeway, and we agree with this, to consult with a work place advisory safety committee ("any employer may consult with a workplace advisory safety committee, etc."), then no restrictions should be placed on the activity of this committee as outlined in subsection (f)(2).

(f)(2)

As indicated under (f)(1), this subsection is unwarranted. If adopted, we suggest the following:

A. The word "may" should be inserted between "employer" and "regularly". Frequency of consultation should be spelled out and reason should preail vis-a-vis recommendations from this lay committee; it should not be used as a tool by employees to harass their employer.

B. The schedule of meetings could be developed by the committee but should be approved by management. Moreover, reimbursement for time spent on committee work should be negotiated with management.

D. We suggest that the following statement be inserted in this subsection: "except as provided by existing contractual or negotiated agreements with employees, employee members are selected each year....".

E. We strongly object to the statement "in which case the employer shall no longer qualify for the penalty limitations provided by subsection (d)." If the employer has documented his effort to form an advisory safety committee and labor refuses to participate, the employer should in our opinion still qualify for reduction of penalties. Unless this provision is granted, the labor representatives could at any time withdraw from the program and by their "unilateral" action cause the employer to lose credit toward penalties.

(g)

In our opinion, the type of consultation program should be advisory as should be any recommendations generated by such "experts".

(g)(1)(C)

This section should be expanded to qualify consulting programs developed and implemented by the employers' certified safety professionals and/or industrial hygienists.

(g)(1)(D)

The secretary should not have to certify professionals who have already been or will be certified through certification programs. The American Board of Industrial Hygiene and the Board of Certified Safety Professionals of the Americas can issue such accreditation.

(g)(2)

This subsection as written equates the advisory safety committee and the "experts". We suggest that a yearly review of operations through the advisory consultation program should suffice. Obviously, management could call in these experts at any time regardless of who generated the request.

(g)(3)

Reports submitted by consultants under the advisory consultants' program should be submitted to and evaluated by management.

(h)(1)

The last sentence in our opinion should be deleted. The records necessary for an employer to claim an exemption as outlined in section (h)(1) obviate the need for a "catch all" article such as "and other necessary and proper information maintained in the normal course of business".

(h)(2)

This section is unwarranted. An employer filing an affadavit under oath that he meets requirements for exemption should suffice. Moreover, employees are currently required under law to maintain records of their injuries and illnesses. Finally, under no circumstances should the Secretary be allowed to rule on the employer's qualifications for exemption. The Secretary may issue a citation but not a ruling.

(h)(4)(i)

This entire section leads to 1) additional paperwork, 2) more time and personal involvement, and 3) the possible beginning of nationalization of state workmen's compensation, which in our opinion would not be advisable.

Respectfully submitted,

Bernard R. Roy

B. R. Roy

BRR:cg

Mr. Richard Schweiker
Senate Committee on Labor
and Human Resources
Dirksen Senate Office Building
Washington, D. C. 20510

Attention: Michael Goldberg
Subcommittee Counsel

Re: Senate Bill 2153, The Occupational Safety
and Health Improvement Act of 1980

Dear Sir:

I am writing you on behalf of the Counsel of Smaller Enterprises ("COSE"), a division of the Greater Cleveland Growth Association, in regard to Senate Bill 2153, The Occupational Safety and Health Improvement Act of 1980. COSE has a membership of approximately 3,300 companies and represents the interests of small businesses in the Greater Cleveland area.

It is the position of COSE that the general purposes of S. 2153 are supportable and its concepts can help improve occupational safety and health. COSE supports these concepts and, despite our concern with particular provisions, recognizes S. 2153 as legislation which deserves the Committee's attention, support, and, where necessary, improvement. Specifically, COSE supports these concepts of S. 2153:

a) Performance-based exemptions;

b) Incentives/rewards for good safety records;

c) Targeting OSHA where it can be most effective;

d) Taking OSHA away from the adversarial role, restricting it to the 10%-15% of the workplaces where review may be appropriate;

e) Performance concept, whereby once a good safety record is achieved, however it is done, OSHA acknowledges compliance. Employers attack safety problems as they see fit, thereby concentrating on preventing injuries, not preventing citations;

f) Greater utilization of private sector consultation programs by employers; and

g) Advisory committees (some form of employee input and communication into the safety and health programs).

COSE also supports the following benefits of S. 2153 for which employers may qualify:

a) Routine safety inspection exemptions;

b) First citation penalty waiver; and

c) Ceilings on the amounts of serious and non-serious penalties.

Although COSE supports the concept of the bill in general, some concern has been expressed regarding specific provisions of S. 2153. COSE offers the following recommendations for the purpose of amending the bill to make it more meaningful and effective.

1. Performance Based Standards

Section 4A(c) (1) of the bill provides a performance standard for employers with a good safety record that would relieve qualified employers from routine safety inspections. The bill directs that safety inspections be based on an employer's safety performance. This is an important concept that would redirect OSHA's safety enforcement toward problem areas while eliminating the unnecessary harrassment of many employers.

In defining a performance standard, however, care must be taken that the standard is realistic, and provides an incentive through an achievable goal for the majority of employers. Otherwise, the standard becomes a disincentive for improved safety performance for those employers who could never qualify despite excellent safety programs. The standard should take into account the hazards encountered in each industry, and reward those in each industry whose record demonstrates safety consciousness and an ability to cope with the hazards encountered. For example, many of the members of COSE who are involved in manufacturing operations have indicated that it is inevitable that lost work day injuries occur in the workplace. For small businesses, one or two lost work day injuries under the proposed legislation, would completely eliminate an employer from the provisions of the safety inspection exemptions. Furthermore, most small businesses are forced to refer out all injuries, even minor, to independent clinics or doctors, thus resulting in a lost work day which for a larger company can be prevented by in-house attention to the injury.

Although COSE is not suggesting that exemptions from routine safety inspections be easily obtained, we are concerned that the present method of qualification could operate in an inequitable fashion. For example, it is unfair to compare the safety records of heavy manufacturing with that of the retail trade. The proposal to exempt employers in low risk industries is sound, because it eliminates unnecessary routine inspections. We recommend, however, that in addition the standard be set so as to reward a specified percentage of employers having the best safety records in each industry. This recommendation would provide an incentive for all employers to improve their safety programs, although, obviously, not all employers would qualify for exemption as a result. Rather, only the very safest would qualify but the effect would be to raise the standard for all.

In this regard, COSE recommends that Section 4A(c) (1) be revised to provide a standard for each industry based on the lost workday case incidence rate for the three-digit Standard Industrial Classification (SIC) Group which applies to the workplace seeking qualification.

2. Use of State Worker's Compensation Data

For purposes of identifying workplaces with "good safety records," Section 4A(b) of the bill utilizes existing state workers' compensation data. COSE strongly questions the wisdom and feasibilty of using this data, especially where less burdensome methods for identifying good safety records already exist. Such requirements would add substantial costs and increase reporting requirements, both of which are unnecessary to implement the components of S. 2153. The director of OSHA has testified before the Subcommittee that only two states have the capacity to comply with these reporting provisions of S. 2153. Furthermore, there is a distinct possibility that the utilization of existing state workers' compensation data could lead to eventual federal pre-emption of this field.

A better alternative would be a system utilizing the OSHA No. 200 Log and Summary of Occupational Injuries and Illnesses. This log is already required to be kept by all employers with 11 or more employees and contains information which would suffice for the purposes of S. 2153. The right side of the Form 200, the half which OSHA requires employers to post during the month of February, could be forwarded to OSHA with minimal expense and inconvenience.

As for employers of 10 or fewer employees, a system similar to the Schweiker amendment to the Labor/HEW Appropriations Bill of 1980, which provides fairly automatic small business exemptions from safety inspections, with significant exceptions, would be appropriate. This concept, which is already law, would ease the burden on small business, while simultaneously preventing a burdensome affidavit filing system which would be difficult for the agency to administer.

Another possible alternative is the use of industry "cuts," similar to those presently utilized, to an extent, by OSHA. The retail, wholesale, finance, and real exemptions which would lighten the burden on both small business and OSHA. Use of SIC codes for this purpose would also help facilitate use of a more efficient, equitable, and inexpensive system of distinguishing safe workplaces.

3. Advisory Committees

Some of our members are skeptical about Section 4A(d) (1) (A)'s prescription for safety committees, either because they feel this provision would facilitate unionization of non-union shops, or because they feel the right of employee representatives to unilaterally bar the benefits of this provision to employers by refusing, even in bad faith, to participate, has potential for grave abuse.

Many employers already have advisory safety committees at their plants and yet fear the intrusion of this provision on their existing programs. Successful existing programs could be rendered unworkable because individual employees or groups may wish to deny employers the benefits of S. 2153.

We believe the obligation of the employer should be to provide the opportunity and the tools for employees to participate in securing a safe and healthful workplace. Nonetheless, this section should be revised to prevent harassment or abuse.

4. General Concerns Regarding OSHA

For small businesses the requirements and burdens of OSHA act as a disincentive for the development of new product lines and increased productivity. Many small businesses have extremely limited capital available for investment in new equipment. The requirements of OSHA result in the diversion of this capital for safety equipment expenditures. The result is reduced productivity and delayed plant modernization. In order to alleviate this problem the tax laws should be amended to permit accelerated depreciation for safety equipment expenditures required by OSHA. The impostion of safety requirements by OSHA on small businesses cannot be adequately accomplished unless Congress concomitantly provides adequate tax incentives to make safety expenditures for capital equipment, thus enabling small business to remain competitive.

5. Conclusion

COSE reaffirms its support for the objectives of a safe workplace. Yet the Occupational Safety and Health Act is not fulfilling this objective. Government statistics indicate that, despite massive expenditures by industry to comply with OSHA and a growing federal bureaucracy, the rate of serious injuries is increasing. Nine years of OSHA experience should be sufficient to convince Congress that reform is necessary. The concepts embodied in Senate Bill 2153 offer a beginning. With the changes which we recommend in this letter, COSE supports S. 2153.

Very truly yours,

George Palmer

George Palmer, Chairman

COSE Federal Legislation

STATEMENT

OF THE

CHEMICAL MANUFACTURERS ASSOCIATION

SUBMITTED

TO THE

COMMITTEE ON LABOR AND HUMAN RESOURCES

OF THE

UNITED STATES SENATE

FOR HEARINGS ON S. 2153

OCCUPATIONAL SAFETY AND HEALTH IMPROVEMENTS ACT OF 1980

MAY 2, 1980

The Chemical Manufacturers Association (CMA), formerly the Manufacturing Chemists Association, takes this opportunity to submit comments on S. 2153, the Occupational Safety and Health Improvements Act of 1980.

CMA is a non-profit trade association representing 195 U.S. member companies, who produce more than 90 percent of the basic industrial chemicals in this country. The members of CMA are committed to the goal of making their workplaces safe and healthful.

CMA welcomes the initiative taken by the sponsors of S. 2153 to improve the cooperative spirit among employers, employees, and OSHA. We believe that entirely too much effort has been consumed by an adversarial relationship among these groups which have such common interests and needs that no such attitude should exist. The safety programs of the nation's workplaces will be greatly improved if this misspent effort could be redirected to meeting these common goals. As the chief sponsor of this bill has said in his remarks in the Congressional Record, this revision to the statute will provide the initiative for placing the individual safety programs in a cooperative mode that should result in benefits to all concerned.

CMA commends the sponsors of S. 2153 on their effort to improve the OSH Act of 1970 to concentrate enforcement activity in hazardous workplaces and encourage self-initiative in improving occupational safety. We agree totally with the concept of the proposed "performance exemptions" from OSHA safety inspections. We believe that by recognizing the value in "performance exemptions" the Bill reflects one of the more important conclusions of President Carter's Interagency Task Force on Workplace Safety and Health. We believe that the provisions of S. 2153 will provide additional incentives for all employers, large and small, to improve their safety performance records. Relative to dozens of other industries, the chemical industry has a good safety record according to figures compiled by the National Safety Council for occupational injuries and illnesses, (Accident Facts, 1979 edition, National Safety Council p. 32-33). Nevertheless, our membership continues to strive to improve its safety record, and we believe the enactment of S. 2153 will assist in the achievement of that objective by concentrating OSHA enforcement activities on hazardous workplaces. One of the major burdens which OSHA now imposes on most employers is the energy expended by management and safety-professionals in coping with unnecessary OSHA regulations and activities. Too often, the employer's self-initiated safety improvement programs, dealing with the most important hazards or problems for that workplace, are needlessly disrupted by OSHA enforcement activities dealing with lower priorities. Such restructuring of priorities and programs are frequently counter-productive to the employer's program, and can be a major source of employer aggravation with OSHA. Further, by restructing the priorities of the employer's safety improvement programs, the real safety needs of the employees

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are hurt rather than helped. Finally, by diverting limited resources to routine inspections, OSHA enforcement personnel are unnecessarily hampered in establishing more appropriate inspection priorities. It is for these reasons that the "performance exemptions" proposed by S. 2153 are mutually beneficial to employees, employers, and OSHA. The sponsors of S. 2153 also promote self-initiated improvement of safety performance and programs by providing reductions in or the elimination of monetary penalties, for qualifying employers who maintain both a Regular Consultation Program, and an Advisory Safety Committee. CMA agrees that these programs can be beneficial in promoting safety and employer-employee cooperation, providing that such programs are not mandated. Where Advisory Safety Committees have evolved from mutual arrangements based upon collective bargaining or similar employer-employee cooperation, they have been generally productive because each of the parties is committed to the success of the activity. Given that S. 2153 clearly provides that Advisory Safety Committees and Consultation Programs are optional, CMA supports these provisions in the Bill.

S. 2153 would exempt from routine safety inspections workplaces with good safety records as determined by comparing the number of lost workday injuries for the previous year with a table set forth in the Bill. (Section 4A(c)(1).) We commend this recognition of performance and use of existing data compiled by workers' compensation agencies. By granting the exemption to employers who achieve specified levels of safety performance, the Bill permits employers to develop their own particular approaches to the problem of employment safety. This flexibility is necessary to avoid restricting employers to rigid standards that cannot encompass all the variations in workplaces.

We believe there would be no less protection for the employee's safety after the enactment of this Bill since we note that inspections for health hazards, serious accidents, imminent dangers, and abatements are expressly excluded from coverage under the Bill. Furthermore, there is no restriction on the right of an employee to register a complaint with OSHA. However, before inspecting the workplace for less serious hazards, OSHA would be required to give the employer an opportunity to provide satisfactory assurances first that appropriate corrective action was being taken.

While we support the general objectives of S. 2153, we would like to offer more specific comments on several portions of the Bill.

We note that as an optional feature of the Bill, first citation penalties would be eliminated or reduced for those employers choosing to maintain an advisory safety committee and a regular consultation program pursuant to the provision of Section 4A(d)(g). Although the advisory safety committee is an option and not a requirement to qualify for reductions in penalties, we are pleased that the Bill recognizes such an avenue for communications where employees and employers may initiate or continue a meaningful dialog on improvements in worker safety. However, we would like to point out the experience by several leading companies as well as studies conducted by NIOSH and the President's Inter-Agency Task Force have indicated that the effectiveness of advisory safety committees in reducing workplace injuries may be limited to special workplace circumstances. (See, *Safety Program Practices in High vs. Low Accident Rate Companies*, HEW publication No. 75-185, National Institute for Occupational Safety and Health). Committees of employees advising employers on issues of safety in the workplace can function effectively where all parties are committed to the cooperative achievement of similar goals. In the absence of such cooperation on the committee, we do not believe that the creation of an advisory safety committee will automatically reduce workplace injuries. Therefore, we support the optional nature of this advisory safety committee so that each employer may make his own evaluation of the desirability of initiating or continuing such a committee.

In recognition of the fact that advisory safety committees are already in existence as a contractual obligation at some workplaces, we recommend that the subsection describing qualifying advisory safety committees should be amended to provide that "this subsection should not be deemed to modify duties or obligations under any collective bargaining agreements". Where the employer does choose to exercise his option of establishing an advisory safety committee in order to qualify for the penalty reduction, we believe that Section 4A(f)(2)(E) should be amended to prevent employers from losing the benefits of the penalty reduction where employees refuse to participate on the committee without good cause. Advisory safety committees can make valuable contributions to improvements in worker safety but only if all parties act in good faith.

We note that the optional consultation program required to qualify an employer for penalty reductions does not provide the reduction where the consultation is provided by employees of the employer. This omission fails to provide for existing programs where qualified safety professionals are employed on the staff of companies to review all conditions in the workplace significantly relating to occupational safety. The requirement for outside consultants should be waived where qualified safety specialists employed on the staff of a company can provide the services that would be rendered by outside consultants.

In order to accomplish the commendable objectives of this Bill, we suggest that clarification be provided with respect to the following terms to save considerable confusion in the administration of this Bill.

The definition of "workplace" in Section 4A(a)(4) provides that workplace means "a single physical location where business is conducted or where services or industrial operations are performed, except that for employers engaged in activities which are physically dispersed, the term 'workplace' includes all locations at which such services are performed...." The definition of "workplace" is important for determining whether the location qualifies for the exemption from inspections based on the number of employees at the workplace. We recognize and support the concept that distinctly separate activities performed at a single physical location would be treated as separate workplaces for injury computation purposes.

We noted initially in our comments that we recognize that this Bill does not limit the authority of the Secretary of Labor to take actions with respect to occupational health hazards. Therefore, since this Bill does not limit health inspections, references to "occupational health" should be deleted from relevant sections describing the scope of the consultation program in Section 4A(d)(1)(A) and Section 4A(g)(2) and advisory safety committee in Section 4A(f)(1).

In Section 4A(c)(1) it is not clear on what basis the Secretary of Labor shall revise the lost workday injury table at three-year intervals after the passage of the Bill. If a certain ratio of number of injuries to number of employees is to be the guideline, then that ratio should be specified.

In Section 4A(b) the term "at least" should be deleted from the sentence describing the contents of the State reports. This deletion will clarify the statutory language to indicate that State reports should include only injuries which result in two or more lost workdays.

CMA offers these comments in the hope that they might be used to further improve this Bill so that, if enacted, its goals of concentrating OSHA enforcement activities on hazardous workplaces and encouraging self-initiative in improving occupational safety might be fully achieved.

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